No. 2968

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST & SAVINGS BANK, Appellant, vs. THE COUNTY OF CLEARWATER of the State of Idaho, and OREN D. CROCKETT, as Treasurer of said County, Appellees.	NO. 2968

Appeal from the United States District Court, District of Idaho, Central Division.

BRIEF OF APPELLEES.

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Brief and Argument

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APPELLEE'S BRIEF

STATEMENT.

In the fall of 1913, the assessors of four counties in Northern Idaho held a meeting, at which meeting the question of cruising timber was discussed (Tr. 302). Patrick Blake testified (Tr. 414).

> "In discussing this question of valuations on timber lands, the brief result of the meeting was this, that we, the assessors who attended that meeting would return to our several counties and report what action had been taken, and

try and urge our county commissioners to cruise at least a portion of the timber lands in our several counties. I did that."

The assessors thereupon returned to their respective counties with the idea of urging upon their commissioners the desirability of having a portion of the timber lands in the county cruised. What was to be done; how it was to be done; and how the cost was to be met, were vague, uncertain and unsettled questions. No definite plan had been agreed upon. The Idaho tax commission, which had authority under the laws to "prescribe a uniform system of procedure in the assessment of property" had not called upon any of the counties to have a cruise made and had made no recommendations to any county assessor that a cruise be made. The assessors in each of the four northern counties went home, each evidently with the idea of working out his own plan. Latah county had about 4000 acres cruised. Kootenai county entered into a contract for the cruising of timber, but the contract was held void by the judge of the district court on the ground that it would create an indebtedness in excess of the revenue of the county for the fiscal year in violation of the constitution of the state of Idaho. No appeal from this decision was taken and the cruise was abandoned.

The officers in Clearwater county, however, more determined that the others, insisted upon having a cruise made, and the county assessor appeared before the board of county commissioners and demanded that they let a contract for the cruising of timber or he would take the matter in hand himself. The county commissioners held a meeting February 24th, 1914, and without the preparation of plans or specifications, or in reality having any distinct idea themselves as to what they wanted or how they wanted it done, but conscious of the fact that they did not have the money to pay for the work, entered into a contract with M. G. Nease, of Portland, Oregon, whereby Mr. Nease was to cruise three townships in Clearwater county. Under this contract Mr. Nease brought about thirty men, non-residents of the state of Idaho, into Clearwater county and began the work of cruising timber.

April 3, 1914, one of the timber companies, in the name of John Lewis, commenced an action in the district court against M. G. Nease, the county commissioners and other officers, and sought to enjoin the performance of the contract on the following grounds among others:

(a) that none of the men were assessors or deputy assessors, and that the board had not complied with the laws of the state of Idaho with

reference to the appointment of deputy assessors; and,

(b) That the cost of the cruise would create an indebtedness in excess of the income and revenue provided for the county for the fiscal year in direct violation of the constitution of the state of Idaho.

All of the moving papers were served upon the defendants on the 13th day of April, 1914, whereupon Mr. Nease and the county board, on the 15th day of April, 1914, voluntarily and by mutual consent, abandoned the contract of February 24th; and, notwithstanding the fact that their attention had been called to the invalidity of the proposed contract, and without attempting to follow the provisions of the law in any respect with reference to the appointment of deputy assessors, and without making any provision to pay for the cost of the work, the county entered into a new contract on the 15th day of April, 1914, with M. G. Nease for the cruising of all of the timber land in Clearwater county at the price of twelve and a half cents per acre.

Peace was soon made with the timber companies, and no further action was taken by them in the John Lewis suit, which suit was, according to agreement dismissed October 13th, 1914. The cruise was fin-

ished about the 1st of November, 1914, and warrants drawn aggregating approximately $63,000.00.

Much dissatisfaction arose over the cruise, and at the election held in 1914, entirely new county officials were elected. They took office January 11, 1915. Investigation on behalf of these officials disclosed that the work had been fraudulently performed; that deceit had been practiced upon the county in securing warrants for the cruising of land not covered by the contract; that other counties in the state were not having cruises made; that no funds were in the treasury with which to pay the Nease warrants, and that an indebtedness had been created in excess of the income and revenue of the county for the fiscal year in violation of the provisions of the state constitution; and, therefore, upon these grounds, payment of the warrants was refused.

M. G. Nease had transferred to the Ehrhardt Investment company warrants in the amount of $18,926.99 which warrants were called and paid the Saturday preceding the Monday before the old officials retired from office. Thereupon Mr. Nease transferred the balance of the warrants to Dexter Horton Trust & Savings Bank, of Seattle, and this corporation brought suit December 27th, 1915. The

case came on for trial May 8th, 1916, and continued for a week. Decision was rendered July 29th, 1916, in favor of the defendants. Decree dismissing the suit was filed September 11th, 1916, from which decree the present appeal was taken.

With the hope that it may be of some assistance to the court, the following names of witnesses are given together with their relation to the case:

COUNTY COMMISSIONERS, Frank Zelenka, Frank Harrison and Elmer O. Torgerson; ATTORNEY, Allen A. Holsclaw; ASSESSOR, Patrick H. Blake; DEPUTY ASSESSOR to check the Nease cruise, J. F. Gorman. M. G. Nease, a resident of Portland, Oregon, to whom was given the contract for cruising timber. John Lewis, in whose name was brought an action on behalf of the timber companies to set aside the Nease contract. Edward Randolph, Roy Wherry, James A. Morrow, John C. Murray, L. E. Albright, Harry M. Leighton, C. M. Conry, A. Hamer, Lester Clark, George Penegor, J. E. Croman, John Miller, C. S. Snyder, Charles E. Hart, Bernard Kelly, L. W. Olinger, W. H. Johnston, F. J. Lods, S. J. Bennison, and W. M. Dockery, were timber cruisers and employes of M. G. Nease on the Clearwater county cruise.

In January, 1914, Patrick H. Blake was probate judge. John T. Molloy was the assessor. Mr. Molloy resigned as assessor and was appointed deputy assessor. Mr. Blake resigned as probate judge and was appointed assessor. He took the initiative and made demands upon the board of county commissioners to have a cruise made. January 11th, 1915, A. E. Hinckley was elected assessor. Oren D. Crockett treasurer, and Fred Choate, John P. Harlan and Jesse L. Coontz were elected county commissioners. Clearwater Timber Company, Milwaukee Land Company and the Potlatch Lumber Company were owners of large bodies of timber in Clearwater county, and conferred with Nease during the time of making the cruise and compared estimates of their holdings with Nease before he submitted his work to the county.

From this point the court might consider our argument beginning at page 78, and, if after considering the first two questions it is deemed essential to make further investigation; or, if the court desires further information concerning the facts it may with profit read the brief of the evidence which follows:

BRIEF OF THE EVIDENCE

THE FIRST CONTRACT.

(Feb. 24, 1914)

Immediately after Mr. Blake had been appointed assessor, he appeared before the board of county commissioners and insisted that the commissioners enter into a contract for the purpose of cruising timber in his county for assessment purposes. The board held a meeting on the 24th day of February, 1914, of which no official notice was given, and entered into negotiations for a contract with M. G. Nease for the cruising of such timber. The county attorney, Allen A. Holsclaw, was called into consultation and he, in writing, advised the board (Tr. 102) to draft plans and specifications "clearly setting forth the kind and character of the work to be performed and making all the necessary stipulations therein tending to inform the bidder as to what you fully expect of him." The county attorney further advised the board to advertise for bids but they did not do so because they did not think it was necessary. (Tr. 364).

Contrary to the express direction of the county attorney, the board advised interested persons that it wanted the timber cruised, and that each person

should prepare his own plans and specifications and the board would thereafter make a selection. Mr. Portfors and Mr. Swanson asked to be furnished plans and specifications, but the board stated that Mr. Nease had furnished his own plans and that if they wanted to do the work they could do likewise. Mr. Nease at that time claimed to have a copyright system on his method (Tr. 313). Such actions of the board tended to stifle competition and were unfair to the taxpayers. Mr. Blake, however, was demanding that the board do something at once and made the threat that if they refused or delayed the matter he would take the matter in hand himself and have the timber cruised. (Tr. 313).

Mr. Portfors wanted to bid on the cruising and talked with Mr. Zelenka about it (Tr. 237), and though demanding plans and specifications, he was told at the meeting by Commissioner Zelenka that his bid would not be considered because he had worked for timber companies (Tr. 238), notwithstanding the fact that he was not then in the employ of any timber company. When Mr. Portfors was trying to find out what was wanted through Commissioner Harrison, Assessor Blake took the floor and demanded that the contract be let then and there. (Tr. 238).

It was conceded that no notice or call for bids was made, notwithstanding the fact that it was the practice of the board to call for bids on all contracts involving over five hundred dollars (Tr. 301). At this meeting, however, two other bids had been filed —one by Ralph B. Hunt (Tr. 47) wherein he agreed to do the cruising for actual cost plus two cents per acre for every acre carrying over one million feet B. M., with a guarantee that the total cost would not exceed eight cents per acre (Tr. 50). E. L. Rankin also filed a bid (Tr. 51), wherein he agreed to cruise and estimate all timber on sections carrying over one million feet B. M., and furnish topographic features, etc., at a total cost of seven and a half cents per acre.

Attention is called to the conditions of each of these bids, that the charge should be made only upon lands cruising over one million feet B. M. It will later be shown that in accordance with the terms of the contract with Mr. Nease he was to be paid twelve and a half cents per acre for cruising patented timber lands. Nevertheless, he was paid for cruising not only patented timber lands, but state and government timbered lands, and also for marshes, burns, agricultural lands and townsites. The board, however, apparently gave no consideration to anything but the bid submitted by Mr. Nease, other than

to say that the others were not satisfactory (Tr. 229) though no reasons were assigned. Objection seemed to be made to all persons seeking the work other than Nease, on the ground that they had at some time worked for a timber company (Tr. 230). However, Nease was not a practical timber cruiser and did not pretend to be (Tr. 350)—he was nothing more than an employer of timber cruisers and engaged in selling their work to various counties at great profit to himself.

Nothwithstanding the fact that the assessor and county commissioners insisted that a contract be entered into on the 24th day of February, and notwithstanding the fact that the board did not have time to find out what kind of a cruise they needed themselves, and had made no plans or specifications with reference to the manner or method of making the cruise of the kind or features of topographic reports that were required, and notwithstanding the fact that the spring is the best time to cruise, for the reason that the snow is on the ground and is well settled and the brush, which is very difficult to go through in the summer, is eliminated by cruising on the snow (Tr. 235), nothing was done by Mr. Nease toward getting into the timber until about the 6th of April when he arrived at Bovil (Tr. 665), and

wired the Potlatch Lumber Company, asking it to arrange for accommodations for his party and the county officials.

These same county officials who were afraid to even employ a cruiser who had worked for a timber company, were included in the request made by Mr. Nease to the Potlatch Lumber Company for accommodations. Nease apparently expected some opposition from the timber companies at some time, and commenced to make peace with them early.

THE SECOND CONTRACT.
(April 15, 1914)

On or about the 8th of April, 1914, and immediately after Nease had commenced the cruise, a complaint was filed by the Clearwater Timber Company in the name of John Lewis (Tr. 648) against all of the county commissioners, the county treasurer and M. G. Nease wherein the plaintiff prayed to have the contract with Nease cancelled; and that the county be enjoined from issuing any warrants for work done under such contract (Tr. 661). This complaint advised the defendants that Nease and his cruisers were non-residents; that they were not deputy assessors; that they were not proceeding according to law; that the contract price would exceed the income

and revenue for that fiscal year, in violation of the constitution of the state of Idaho; and that the ordinary and necessary expenses of Clearwater county would exceed the income and revenue provided for said county for said fiscal year (Tr. 658). The board was further advised that neither the board of county commissioners nor the county assessor would have any control over timber cruisers. (Tr. 657).

All of the commissioners were served with copies of this complaint on the 13th day of April, 1914, (Tr. 352) and on the same day each of the defendants in the case, including M. G. Nease, had been served, not only with a copy of the complaint, but with a copy of the summons and order to show cause, together with a copy of the affidavits annexed to such order (Tr. 64). By the service of these affidavits upon each of the county commissioners and upon all of the defendants, they were advised: That the same M. G. Nease had in 1913 taken a contract to cruise heavily timbered land in Clatsop county, Oregon, at 12½c per acre (Tr. 71), and that he had sublet the work to Mr. McKinnon and others at 4c per acre—the cruiser was to pay his compassman and provide all subsistence; that Nease had required James P. Hagadone to violate his written instructions with reference to the method of cruising, and to comply with verbal in-

structions (Tr. 78); that it was impossible to make a thorough cruise by a single run through the timber (Tr. 79); that the cruising of timber was not only inaccurate and unreliable, but that Nease was unreliable in his transactions; that a cruise such as Nease intended to give was of no value for assessment purposes on account of the wide variation in the judgment of cruisers (See affidavit of H. M. Price (Tr. 80) wherein on the South half of Section 14, Township 6, Range 3 east, Price found 21,160,000 feet, whereas Nease found 50,850,000 feet). Tr. 80-3; that the Nease cruisers were "careless, incompetent and crooked," and that the Nease cruise was not even a good guess (Tr. 76); that the head checker for Mr. Nease, viz. John W. McKay, was incompetent, and by the insistence of A. Osborne, his cruising was so proven in Oregon. (Tr. 74-5).

A reading of this affidavit showing the fight that one individual timber owner had in order to get a correct cruise, would certainly put a county commissioner on his guard before letting the contract to M. G. Nease or to any other person. Here, not only after the recheck of the cruise had been made and before the owner could secure justice, it was necessary to send out five men to count the trees, and it took

these five men four days on one quarter section to prove that Nease's cruise was grossly erroneous.

The evidence further on will show that these cruises are nothing more than the wildest kinds of guesses on individual tracts of land and are of no value for assessment purposes; that in order to make a cruise which would be of any value for any such purpose, the cost thereof would be absolutely prohibitive; that nothing less than an actual tree count could get the board measure of timber on individual tracts, and even then the elements of judgment of the particular cruiser for deductions for breakage and rot and defects, enters so largely into the estimate that under those conditions no two cruisers going over the same land at the same time and under similar conditions would arrive at the same result; and these commissioners were further advised that Nease had been in trouble on account of his cruise also in Clackamas county, and that a petition for the recall of the county judge and one of the county commissioners had been filed on the 22nd day of July, 1913; and that said county judge and county commissioners of Clackamas county had been recalled by an election held on the 16th day of August, 1913, on account of these officers entering into a contract for

the cruising of timber with M. G. Nease in that county. (Tr. 87-9).

The question of the legality of the board entering into such a contract without complying with the law requiring the appointment of deputy assessors, and especially without having funds with which to pay for such work, was brought to their attention, and is admitted by the commissioners. Knowing these facts the commissioners were eager to enter into another contract with Mr. Nease involving over $63,000.00.

The county commissioners had consulted Attorney Dwight Hodge and Attorney Geo. W. Tannahill, and both of these attorneys had advised them that their contract was not worth very much and that perhaps they had better have a new one (Tr. 306). County Attorney Holsclaw had advised them that it was not worth the paper it was written on (Tr. 305), but notwithstanding the fact that the board knew that the cost of this cruise would exceed the levy, and that it would be necessary for future boards to make levies in such amounts as they could to take care of these warrants (Tr. 301) and that the liability would exceed the income for the fiscal year, and that no election had been called and no arrangements made

to pay for such indebtedness (Tr. 658), and without waiting for a judicial determination of the legality of such contract with Nease, (Tr. 300) the board of county commissioners held a meeting with Nease and their respective attorneys, cancelled the old contract, and entered into a new one.

Nease testified (Tr. 337) that he cruised in Clackamas county approximately 600,000 acres, " 3-4 of the amount was farm lands with just a piece of timber here and there and all very accessible," at the contract price of $51.20 per section. (Tr. 89). It certainly was no wonder that these officers were recalled, but it is rather remarkable to notice that, notwithstanding the knowledge of the foregoing conditions, the Clearwater County commissioners would have any further dealing with Nease at all.

At the meeting of the board held two days after they were served with summons, complaint, order to show cause and affidavits in the John Lewis suit, a meeting was held at which there was present no one to submit bids for the cruising of timber, other than Nease; no plans or specifications for cruising were prepared by the county commissioners, (Tr. 232), and a second contract was entered into on the 15th day of April, 1914, which contract is set out in full

(Tr. 95-101). By the terms of this contract (Tr. 96 Par. 1) Mr. Nease agreed to "make or cause to be made a careful, complete and thorough cruise and estimate of all of *the timber on patented lands* situate in Clearwater county, Idaho."

Under the first contract the board of commissioners on the 28th of March, 1914, designated 36 sections to be cruised (242), whereas the second contract provided for cruising of timber lands in the county, with the permission to withdraw certain lands.

METHODS AND COMRARATIVE VALUE OF CRUISING.

(a) *Single run and similar systems valueless for anything other than a reconnoissance.*

The evidence will show that there are in use by timber cruisers more than forty different methods of cruising (Tr. 379), and that timber cruising is not a science, but at best it is only the result of a man's judgment and experience in looking at a small portion of timber on a strip of ground and using that as a basis upon which to guess at the amount on the balance of the ground (Tr. 379); for instance, if a cruiser worked north and south through a section of land, and another one worked east and west through

the same section, their results on account of having seen different portions would probably vary to a large extent. Not only does the direction taken by the cruiser have a considerable effect upon the amount of timber he will guess is on the given tract of land, but the weather affects his judgment, and a cruiser will get more timber on the same land in bright weather than he does in bad weather. (Tr. 380).

An assessment of property for taxation under the laws of Idaho includes a listing and valuation. If it is necessary under the laws and the constitution of the state of Idaho to list the timber on timber land by the thousand feet, as is purported by the Nease cruise, it would be necessary to make a tree count upon each individual tract; and the cost thereof would be prohibitive. As will be shown, the methods employed by the Nease cruise in Clearwater county were about as effectual in determining the amount of timber on individual tracts as though the assessor had taken a compassman and followed a few direct lines through the county and counted the number of cattle and horses he saw on a certain strip of ground, and then multiplied the number found on that strip by the ratio that the area of the strip bore to the entire county. Such a proceeding of course would

be nothing more or less than a farce, and the evidence in this case conclusively shows that the purported cruise under the Nease contract was not only inaccurate and of no value for assessment purposes, but that fraud and deceit also entered into the work and the reports turned into the county were prepared *outside* of the state of Idaho and in the state of Oregon, and that the topography and various reports were faked and changed in order to suit the dictates and caprice of the contractor.

The evidence will also show that these non-resident timber cruisers were attempting to exercise the functions of the assessor, not only in the purported listing of timber, but in making a decision as to whether or not a body of timber should be assessed or listed on account of its location or supposed merchantability.

Reference is made throughout the transcript to single-running and double-running, and various other methods of cruising. The witness Randolph gives a very good description of the method used (Tr. 252). In general the cruiser in single running follows the compassman on a line through a 40-acre tract and counts the trees on a strip of land four rods wide, and by assuming that the balance of the land con-

tains the same amount of timber as he saw on the narrow strip with (certain exceptions for burns, etc.), he arrives at an estimate of the amount of timber on the particular tract of land.

There are many reasons why such a method is of absolutely no value to a county for assessment purposes. First, the results are inaccurate and the variation of individual cruisers, as will be shown, may amount from 100 per cent to 300 per cent in going over the same land at the same time and in the same direction. If the land were all level and the timber uniform, of course such a method might be fairly accurate, but with deep canyons and high ridges, and the ground covered with underbrush (Tr. 316), cruising in Clearwater county is very difficult. It is still more difficult for the reason that the timber is not uniform and the cruiser will have to take into consideration red fir, white fir, pine and other kinds of timber, including old growth and new growth all at the same time. (Tr. 235).

Bearing in mind that the contract Mr. Nease entered into with the county was that he was to furnish a complete and accurate cruise of all of the timber on the patented land in Clearwater county, we call the court's attention to the following testi-

mony which has a bearing upon the method employed by Nease:

A thorough cruise by single running is impossible. (Tr. 79).

Cruising is nothing more at best than an estimate based largely upon the judgment of the estimator, which he gains by experience in the field. (Tr. 294).

A single-run cruise is of no value for commercial or assessment purposes on 40-acre tracts, although it might be a fairly good average on a large tract. (Tr. 292).

All cruising is but an estimate, and two experienced estimators may vary materially in their estimates." (Tr. 293).

"If a man makes a double-run cruise he will not get as accurate an estimate as if he made four runs. The more runs the cruiser makes and the larger the area of the tract upon which he counts the trees, the more accurate his estimate will be * * * *" (Tr. 294).

Mr. Benjamin E. Bush, who is a high grade cruiser and has been field agent for the Idaho State Land Department said: "I doubt if a cruiser could

average a quarter of a section a day if he followed the written instructions given by Mr. Nease to his cruisers * * * " (Tr. 292). These instructions are found at Tr. 110-15.

One cruiser might go one way through a forty and see only white pine and he would report all white pine, on the forty, whereas the other cruiser might go a different way on the same forty and see practically all some other kind of timber, and his report would be at absolute variance with the other cruiser (See testimony of J. C. Murray, Tr. 373-74). (Mr. Murray was a supposedly high grade cruiser employed by Mr. Nease to check the work of the other cruisers in the spring).

It is impossible to make a thorough cruise by a single run. (Tr. 73).

One of these cruisers admitted that he cruised (?) 960 acres in one day (Tr. 440), and explained that he did it by looking over the ground from the top of a hill. Plaintiff's witness, Gorman, testified that a thorough, complete and accurate estimate of timber can not be secured by going through it once. (Tr. 449).

Cruising is a guess (Tr. 270) and a single run is not accurate. (Tr. 271).

"One can not arrive accurately at the amount of timber in individual 40-acre tracts by a single run method of cruising." (Tr. 275).

Plaintiff's witness Miller testified that he would not work for Mr. Nease in the cruising of this timber if he had to stand for a check on individual forties.

A single run is generally used in preliminary work. One can't get all the timber in that way in a rough country. (Tr. 249). Nease instructed his cruisers that single-running would be satisfactory (Tr. 253), and the amount of acreage covered by the man, as is shown by the reports, shows that that is the method they employed during the fall cruise.

An average day's work for a timber cruiser is about 160 acres of standing timber (Tr. 251), and it may run to as much as six forties.

Mr. Nease testified (Tr. 347) that "John W. McKay in timber circles in the Northwest is rated as a "top-notcher." "His ability and integrity are absolutely unquestioned." He was supposedly one of the best timber cruisers working under Nease, and was employed during the spring to check the cruisers. However, he did cruising in the fall. This is the same man who, according to the affidavit of Mr. Os-

borne, (Tr. 75) said that he had twice cruised one quarter section of land and found 8,533,000 feet of three kinds of timber thereon, whereas in truth and in fact after a tree count and a cruise by five men, there was in reality only about 3,843,000 feet (Tr. 74 and 75).

Not only is the report on the timber governed by the individual cruiser, but it is customary to sometimes raise and lower a cruiser's work arbitrarily; and Mr. Nease informed his clerk to raise the report of all of the work of Mr. Bennison about 30 per cent. (Tr. 377-8).

(b). *More effective methods of cruising.*

Theodore Fohl testified (Tr. 316) that his method of cruising was to run through each forty four times.

Mr. Gorman, the checker for the county, stated that he could properly estimate from 160 to 320 acres per day but that he had no way of knowing what Nease's men were doing. As will be later shown, the Nease men got a far greater acreage than was consistent with any reasonable method of cruising.

We find one of the plaintiff's witnesses, Harry

Layton, testified that a checker checked a checker and they could not agree. Mr. McKay, one of Nease's checkers, checked the work of Mr. Murray, one of his checkers, "and they did not agree as to size, number of logs to the tree, or in any way in regard to an estimate. They seemed to be working on entirely different systems." (Tr. 391).

If the confessedly two best men that Nease had with him could not agree, either as to sizes or number of logs per tree, or on any other particular, then what could one expect of the rest of the work? If these two men who were supposed to check the work of other less competent men could not agree upon any of the particulars with reference to a cruise, then certainly such a cruise would be of no value as a listing of property for assessment purposes.

The plaintiff's witness, J. D. Gorman, testified (Tr. 449) that when he was working for J. D. Lacey & Company, he was required to go through a forty, eight, twelve and sixteen times; that he had just come from a cruise where they were required to go through each forty eight times. This, however, cost 40c per acre.

Mr. Charles Portfors testified that his method of cruising was to go through each forty twice (Tr. 233)

and that 160 acres was a good average for a day's work (Tr. 235); that the best time to cruise timber was in the spring while the snow was settled (Id.), that a single run is of no value for assessment purposes (Tr. 236); and his method of computation is set forth Tr. 236-7.

Ellis Small testified that in the preliminary cruise they went through each forty twice, and in the final cruise they passed through each forty-acre tract eight times, and by that method he would cruise about 40 acres a day (Tr. 314-5); that in order to follow Nease's instructions, one would have to go through the land twice to get the information called for. (Tr. 317).

Plaintiff's witness and checker, J. C. Murray, testified that he thought his instructions were to double run unless in his judgment under certain conditions a single run would be sufficient. (Tr. 322). He cruised about 25,000 acres in 86 days, or an average of 310 acres per day, (Tr. 322) but most of his work was on smooth ground. (d).

The amount of acreage covered by each of the cruisers according to the field reports, is found in the transcript, pp. 290-91.

(c). THE SPRING AND FALL CRUISES.

The record shows that Nease commenced to cruise about April 8th and continued until the 16th day of June (Tr. 333). This was referred to during the trial as the "spring" cruise, and it appeared that during these few days the men were endeavoring to get pretty accurate results, because they double run all of the work (Tr. 248). During this spring cruise Mr. Nease also had checkers after his men in the field. All cruising was abandoned, however, on the 16th of June and was not again taken up until about August 1st. (Tr. 333).

The testimony would point to the conclusion that the pending of the John Lewis suit caused Nease to withdraw his men until he could make peace with the timber companies, which was done during the summer and before his men started to work again in the fall, as the evidence hereinafter referred to will conclusively show. Nease denied, however, that the Lewis suit had any effect upon his withdrawing the men and stated that the death of an uncle had something to do with financing the job (Tr. 334). The letter, however, offered in evidence by plaintiff, bearing date February 19, 1914, and signed by Mr. R. L. Howard, assistant cashier of the Ladd & Til-

ton bank, of Portland, Oregon, wherein it is stated: "We have from time to time assisted Mr. Nease in the financing of his operations, and the writer does not know of an instance in which a request of Mr. Nease has been refused." (Tr. 576), would indicate that something other than the death of an uncle who might have assisted financially, was the moving cause for the withdrawal of these men from the field.

However that may be, the timber companies and Nease reached an amicable settlement and the John Lewis suit, which was instituted by the timber companies, was settled and by them later withdrawn pursuant to an agrement had with Nease, and Nease brought his men back into Clearwater county about August 1st and turned them loose into the timber, with tacit if not express instructions, in all instances, to go over the ground as quickly as possible and turn in the reports. During this fall cruise the larger portion of the ground was covered. It was all single run, and Nease employed no checkers in the field. The sole object was to cover the ground, make a report, get the money and get out of the country.

The witness Wherry testified (Tr. 258): "I double run the larger portion of the land I cruised for Mr. Nease in the spring * * * . All the land I cruised in the fall was single run."

They were double running most of the land in the spring (Tr. 240), but in the fall they were instructed to single run it.

TIMBER CRUISING OF NO VALUE FOR ASSESSMENT PURPOSES.

Notwithstanding the apparent mandatory requirements of the revenue laws of the state of Idaho upon the assessing officers, which had been in force in the state of Idaho for many years, and notwithstanding the argument of the appellant to the effect that an assessing officer must cruise timber in order to arrive at the value of timber lands, nevertheless, there has been no case where the assessing officers have been required by mandamus proceedings or otherwise to cruise or even estimate growing merchantable timber. Notwithstanding the continued agitation among certain inhabitants of the state during political campaigns, and at other times, and through the press, no one has conceived of the idea that under our laws existing at the time of the letting of the Nease contract and prior thereto, and since that time, it was necessary to have such a cruise made.

In Idaho, a number of people at various times appear to live in constant fear that timber compan-

ies are going to seek some advantage over other property owners, and the companies are assailed from some sources and defended from others. It would seem that Clearwater county was no exception to this rule, and when P. H. Blake resigned from the office of probate judge (which office carried a very small amount of labor) and assumed the office of county assessor, that the agitation had reached such a point that something was going to be done in Clearwater county. It looked upon the face of it as if the timber companies were going to be the butt of the Nease cruise, that they would bear the expense of the cruise, and that the extent of their holdings would be made a matter of public record.

The evidence will show, however, that long before the fall cruise was commenced, Nease was working hand in hand with the timber companies. They knew every move he made and he was in conference with them time after time—in fact it will be shown that all of his work was exhibited to and compared with the cruises of these timber companies in Clearwater county before it was submitted to Clearwater county; that the estimate of Nease was so far below the actual estimate which the timber companies had, that no complaint was made by them upon any cruise turned into the county by Nease. This is

a rather curious coincidence, when we take into consideration the errors which occurred in cruising, as have been and will be hereinafter shown.

THE LISTING—VARIATIONS IN JUDGMENT OF CRUISERS.

It must be conceded that if property for assessment purposes is going to be listed, there must be some system of listing which will be practically uniform. The Idaho laws and constitution specifically provide that property shall be assessed by a uniform method. If for the sake of argument we should say that a timber cruise was necessary, it goes without saying that the cruise must list the amount of timber as nearly as practicable on each individual tract.

The evidence will show that notwithstanding the fact that a cruiser might in cruising say ten thousand acres of land, arrive at a fair estimate as to the amount of timber on the total, his judgment would vary so much upon individual legal subdivisions as to make it absolutely worthless for assessment purposes when that ten thousand acres would be owned by fifty or seventy-five individuals.

The checker, Murray testified (Tr. 385) "If a question arose in court as between the county and a taxpayer who owned only 40 acres of timber land or

160 acres of timber land, two competent cruisers might, after investigating it, come in and one honestly testify to a million and the other to two million feet on the particular tract."

Mr. Murray also testified "I have known what we consider the best cruises to vary 300 or 400 per cent, but I should think that a usual, ordinary, natural variation ought not to exceed 25 per cent."

He further testified (Tr. 380) "The same cruiser never gets the same result in cruising a tract of land a second time after a lapse of a few months or a year. He will vary over ten to twenty-five per cent. This is because he does not see it at the two different times in the same way."

Murray also testified (Tr. 323) "the estimates of ordinary competent cruisers of the amount of timber on individual 40-acre tracts will vary very much, *frequently as much as fifty per cent or more.*"

Of what value then is such work to an assessor in the listing of property, if an ordinary, competent cruiser can not get any closer to the amount of timber on an individual 40-acre tract? The work would have no authenticity, would not back up the county commissioners or the assessor in case of dispute, and would therefore be absolutely valueless.

Murray also testified (Tr. 384) "Two competent, experienced cruisers, cruising side by side at the same time and in the same manner, might reach substantially different conclusions on individual 40-acre tracts. As a whole they would not. One might find 1,500,000 on a forty and another 1,000,000; there might be a difference of 33 1-3 per cent or 50 per cent.

Plaintiff's witness Miller testified (Tr. 456) "I would not stand for a check on individual forties * * the amount that I might differ in my estimates on an individual forty from the checker's estimate would depend on where I would start and where the checker would start and how much green timber and burned timber there would be on the forty. I have varied 100 per cent from other men, and I have been as close as two and three and five per cent of what fair-minded men would put on a forty."

Plaintiff's witness C. M. Conry testified (Tr. 427) that there might be between 25 per cent and 40 per cent variation on particular tracts, and assigned different reasons for these variations.

The plaintiff's witness Hamer testified (Tr. 434) "In my judgment 25 or 35 per cent would be a normal percentage of variation between the esti-

mates of two competent cruisers on the same 40 acre tract. A difference of from 30 to 45 per cent would be considered a grood cruise. Variations in excess of that sometimes occur."

A FEW SPECIFIC INSTANCES OF VARIATION

Clearwater county could not go to the expense of an entire recruise in order to show that the work was valueless to an assessor, but it did employ a compassman and two cruisers to go out and check some of the work turned in by Mr. Nease. These recruises show that the Nease work was hastily done; that it was unreliable and incompetent for any purpose. If a cruise were required one might overlook the honest variation in judgment between timber cruisers on certain points, but we can not overlook the report to the county of land as "burned" where in truth and in fact it was covered with a good growth of green white pine.

The difference in the judgment as to the amount of defects makes a wide variation (Tr. 383), and, in order that the work of the cruiser may be a fair check, it is necessary that the checker go over the land at the same point and in the same way as the cruiser (Tr. 379); if the cruiser ran east and west and the checker north and south of course there

would be no check at all. The owner of the land, however, and the assessor, relying upon one of these reports would have to take one or the other. Many of these timber owners reside outside of the state of Idaho and would without question have to accept the amount for assessment purposes placed upon the roll by the assessor from one of these cruises. If the cruiser walked east and saw only buck brush and black pine, his estimate would probably contain a few poles or possibly nothing. If the cruiser walked north through a heavy strip of white pine, the owner might be assessed upon a basis of having four million feet of white pine. Can such work be considered of any value for assessing purposes?

If the checker reports that a cruiser is low or high, the estimates of such cruiser may be automatcially raised in the office. (Tr. 350).

The county commissioners knew of these wide variations in timber cruises, and had them specifically called to their attention in the affidavits filed in the John Lewis suit. (Tr. 74).

Nease testified (Tr. 348) that some cruisers hit and miss, and that nothing can be done with them; that others may be uniformly low or high; and that a checker, after determining his percentage of error, adds to or subtracts from the report sent in by the

cruiser, and makes, according to the office, a nice, uniform cruise. And the witness Nease, knowingly referring to the large discrepancy shown by the field reports of Murray on the Northwest quarter of the Northwest quarter of Section 18-39-6 E. showed that the crossed-out figures were not turned into the county, "but other figures that were written in are the ones that were turned into the county. Mr. McKay did not file any estimate of the result of his cruising. I think Mr. Fulton wrote the substituted figures in."

Changes were made in the office on the reports sent in by Cruiser Morrow on sixteen different forties (Tr. 349). It was not shown that Mr. Morrow was ever called into consultation with the checker or asked any questions concerning his work, but an arbitrary change was made.

We call the court's attention to the field reports of two of Nease's cruisers, Murray and Hart, (Tr. 373) where they accidentally cruised and turned in reports on the same land. On the southwest quarter of the southwest quarter Murray found 400,000 feet of red fir and 200,000 feet of white fir. Hart found only 100,000 feet of red fir and 10,000 feet of white fir, and 15,000 of white pine. Murray found three

times more red fir, twenty times more white fir than Hart on one 40-acre tract, while Hart found 15,000 feet of white pine which was entirely overlooked by Murray, In the southeast quarter of the southwest quarter Murray found 300,000 feet of red fir, and 150,000 feet of white fir; while Hart found 150,000 red fir, no white fir, and 15,000 white pine. On the entire 160 Murray found no ties, while Hart found 37 ties. On the southeast quarter of the southeast quarter Murray found 300,000 feet of white and red fir, while Hart only found 40,000. Murray found nearly eight times more than did Hart on one 40-acre tract.

Now these reports are from two of the best cruisers that Nease had in the woods. This is the only place that we were able to find field reports where two of Nease's men unknowingly covered the same ground and filed field reports of their work, and it certainly is an object lesson as to the method employed in the Nease cruise. Plaintiff's witness Murray was on the stand, and the only explanation he could give was "Mr. Hart might have gone over the forty in a different manner than I did, and that might account for the difference." (Tr. 373).

If these exceptionally good cruisers varied from 500 to 800 per cent on the amount found on an individual forty-acre tract, there is certainly a great

gamble and lottery in the amount of error in the reports that would be turned in on over 500,000 acres of timber land in Clearwater county.

In one of the field reports where Nease returned to the county no white pine at all, there was indicated by somebody "somewhere in Oregon" that on that particular 40-acre tract there were 225,000 feet of white pine (Tr. 328). We also call attention to the field report of Section 28, Tp. 39-3 E, where the figures in the margin indicate the estimate of timber companies for comparison with the Nease cruise on white pine (Tr. 335); and on this one little tract it is shown that where Nease reported 450,000 feet of white pine, the company had an estimate of 600,000 feet; where Nease had 450,000 feet, the same company had 1,100,000 feet; where Nease had 650,000 feet, the same company had 1,000,000 feet; where Nease had 550,000 feet, the same company had 1,100,000; where Nease had 700,000 feet, the same company had 750,000; where Nease had 600,000 feet, the same company had 900,000.

There is a statement of the ownership of timber lands in the records (Tr. 675 to 750 inc.) which shows that the Clearwater Timber Company, the Milwaukee Land Company and the Potlatch Lumber

Company owned practically all of the land estimates on which had been compared in Nease's office in Portland, Oregon, before such reports were delivered to Clearwater county.

Nease further testified (Tr. 336) "None of the timber companies complained because I had 450,000 white pine where they had 900,000."

If counting the trees and estimating the timber on a strip of land two rods wide is to be taken as the basis for determining the amount of timber on the entire forty, then with the same reasoning can we come to the conclusion that the same proportion and magnitude of error and discrepancy in the Nease cruise disclosed by the comparatively small amount of rechecking performed by Wherry, Swanson and Albright, would be shown in all of the work performed by Nease.

The testimony at the trial covering the period of six days, showed hundreds of such inaccuracies as have just been pointed out, and in all the time the plaintiff and Nease and his cruisers were on the *defensive* trying to explain variations, discrepancies, fraudulent reports, deceitful work and faked reports, and never offered to show that the work on any

individual tract was a thorough complete and accurate cruise.

These wide discrepancies, whether the result of the difference in judgment in men, or in the method of cruising, or in the weather, or from any other reason, are brought to the court's attention to show that for assessment purposes such work as was done by Nease was valueless, and also that such a method would work an unjust discrimination among the taxpayers not only of the county but of the state of Idaho, as well.

UNFAIRNEESS ARISING FROM DIFFERENT METHODS OF ASSESSMENT.

We find that Assessor Blake testified (Tr. 423), "The board, after full consideration, decided that if they had only a portion of the timber lands cruised * * * the other timber owners would probably object, as they would be either getting the best or worst of it and have reasonable grounds for commencing an action against the county for unjust discrimination."

If to assess a portion of the county upon a cruise, and the balance by another method, would constitute an actionable, unjust discrimination, with stronger reason would the cruising of timber in one or two counties of the state for assessment purposes consti-

tute an actionable, unjust discrimination, either in favor of or against those counties for state taxation purposes, and the county cruised would be at a disadvantage before the state board of equalization.

Commissioner Harrison testified (Tr. 310).

"It developed at the meeting of the state board of equalization that we were assessing timber lands in Clearwater County on a different basis than they assessed them in different parts of the state. Some of the counties—I think Latah—I am sure this had a cruise at the time; I think Bonner had some of their land cruised, while in some parts of the state they were assessing by the acre, and in some places by the thousand feet."

The witness Harrison also testified (310) "Mr. Ramsted of the State Tax Commission, stated that he hoped the whole state was cruised and classified in all timber counties along the lines we had followed."

While it seems that some of the county assessors and Mr. Ramsted hoped or wished that all of the timber lands in the state had been cruised, nevertheless, there is no intimation or suggestion that the law required a cruise of timber lands for assessment purposes.

THE NON-RESIDENT CRUISERS USURP THE FUNCTIONS OF THE ASSESSOR.

No cruiser was or purported to be a deputy assessor. However, Nease's cruisers did more than act as listing officers; they assumed the functions of the assessor in determining whether or not certain bodies of timber should be reported at all; for instance, plaintiff's witness Hamer (Tr. 436-7) testified that if in cruising he would come upon, for example, 200,000 feet of tamarack in the center of a section, so that the timber was isolated, he might eliminate it entirely, and stated, "If in my judgment it was not of any marketable value as timber, I might not mention it at all * * * * . When I found some sound timber on the land, because of its location or isolation or for other reasons, I did not think was commercially of any value, I considered it to a certain extent. I would probably say there was some, but not to any extent."

This shows that the cruiser attempted to go far beyond the functions of a mere listing officer, and passed judgment upon whether or not they would report certain bodies of timber. It would seem that if under the Nease contract he was to cruise all of the timber on timbered lands, that it would at least be incumbent upon him to report it and let the assessor

determine whether or not it was merchantable or whether it should be included in making the assessment.

The plaintiff's witness John Miller (Tr. 454) testified "In making up my estimate I also took into consideration the value and the location; that is to say, if I found some green timber which I concluded was of no value because of its location, isolation, or some other reason, I would report that there was timber on the ground but not sufficient to turn in as an estimate because it was worthless. *I would not cruise it.* It would have been possible for me to make a report that would have shown the actual quantity of the timber and the conditions and quality in such a way that the assessor could have judged of its value for taxation purposes. I did not do that because I was supposed to use my own judgment in regard to it."

THE REPORTS SUBMITTED TO CLEARWATER COUNTY.

As stated before, the reports submitted to the county are inaccurate and unreliable, and in many instances faked. Paragraph 2 of the Nease contract (Tr. 96) provided: "Said reports to contain topographic sketches showing the elevation of lands

above sea level, taken by means of Aneroid Barometers, said reports to show all openings, burns, marshes, rivers, lakes, creeks, trails, roads, waterfalls, valuable stone, mineral outcroppings, and all other topographic features observed by the cruisers, said reports and sketches to show a general description of the character of the land cruised, describing its adaptability for agriculture, grazing and other purposes after the timber is removed * * * * *."

Plaintiff's witness, Dockery, testified (Tr. 469), "I used my own judgment in regard to the classification of the soil. You can call it that. I walked over it and made a guess at it. I certainly did not dig down into it."

Cruiser Wherry testified (Tr. 260) that in his report to Nease he showed a broken divide, whereas Nease reported a main divide running through the south half of Section 6, Township 38-6; that there were several ridges shown on his report that were not shown on the report to the county; that there was considerable difference between the reports in the number of elevations shown; that his report showed an elevation on each ridge and Nease's report showed no elevation except on the 40 line; that Nease had reported to the county that this land was steep,

rough and rocky, whereas the cruiser found no such condition.

Plaintiff's witness Croman testified (Tr. 450) that he did not know that the elevations shown on the map were of any value "further than to give a very perfunctory idea of the land. Information of the elevations at the tops of the ridges and at the streams would be more important to a logger than at the section corners. A logger always goes over the land himself before he logs it. I never tried to log by any topography map."

Nease led the county to believe that he was at least double running all of the timber land. Appellant suggests in its brief (p. 24) that if there were some inaccuracies in the performance of the contract, the acceptance of the work by the commissioners was binding upon the county "in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of the acceptance."

The entire work of Nease and his cruisers in Clearwater county was apparently one continual round of fraud and deceit.

Appellant was objecting to the introduction of

the field report of Archie Young, which bore the following notation:

> "These two forties were actually cruised. Balance done in camp." (Appellant's Brief p. 25).

This notation is quite pertinent, especially when taken in conjunction with the testimony of Fred Bailey (Tr. 227) that Archie Young cruised two sections or 1280 acres by just walking up the trail and back over the same trail.

If the contractor Nease was advised that a cruiser was doing the work in camp, he certainly should have taken some steps to advise the county. In the instructions to cruisers. (Tr. 112) it is stated:

> "Take elevations by means of Aneroid Barometer on all lands examined, as follows: You will take the elevations at each section corner, then in going through each subdivision, you will take the elevation on each forty line, whether there is a change in elevation or not, and then you will take further elevations at the top of all ridges and at the banks of all creeks and streams and at the bottom of all ravines. Further than this other elevations should be taken at intervals not to exceed 100 feet in elevation. SHOW EXACT LOCATION AT WHICH ELEVATION IS TAKEN BY MARKING YOUR PLAT WITH A SMALL CIRCLE, AS INDICATED ON THE ATTACHED PLAT."

With these positive instructions to cruisers and

with the plats being turned into the county by Nease showing two elevations on each forty line, the county would be justified in believing that elevations were shown at the exact location at which they were taken. In the first place there seemed to be lack of confidence in the accuracy of the Aneroid Barometer. We find plaintiff's witness, Penegor, testified (Tr. 447). "I have seen my aneroid barometer change 750 feet in twenty-six hours lying on a table, not moving at all."

The witness Randolph testified (Tr. 251), "At the start I just put the elevations on the forty line of some of my plats. I generally showed four elevations on a forty-acre tract. I did not always read the barometer at the point indicated on the plat. My instructions were to put the elevations at two points on each forty line. Aneroid barometer determinations were very seldom put down on the actual spot where it was taken because we generally put down the elevations at some point designated by even hundreds of feet, and it is often 75 or 50 feet or half a tally from where one is standing reading a barometer to such point."

The witness Dockery testified (Tr. 469) that even though his plat showed two elevations on the

40 line, it did not necessarily follow that his compassman went through a forty twice; that he was probably a tally away. "I can see no reason why the elevations were not taken and reported on along creeks and ravines. By the looks of this here, it does not seem that my compassman showed on my reports the changes in elevations exceeding 100 feet regardless of the forty lines. I figured that the elevation was a minor proposition any way. When I cruised the forty line only once, I showed the elevation twice to give more data."

The compassman for Archie Young (Tr. 277) visited only one section corner for cruising of sections 24 and 25, and yet the plat turned in to the county showed elevations taken twice on each forty line in each section. By taking two actual readings, Nease's men indicated on the plat to the county that 160 actual readings had been taken on these two sections.

The cruiser, Conry, testified (Tr. 430) that he showed two elevations on each forty line because the instructions called for them, and he also testified that his compassmen did not take elevations at all on tops of ridges and beds of streams and that "It was impossible to comply with instructions in that

regard. I complied with instructions as much as I considered necessary to get results."

The cruiser Hamer testified (Tr. 438) "My compassman did not take the elevation. I did it. I did not personally go to all points where the elevations are indicated. The elevations on the plats do not indicate points at which I actually read the barometer. They indicate the elevation as near as I could judge from any point taken by me."

The witness Penegor testified (Tr. 446), "I do not know any particular reason why we indicated two elevations on the forty line when we were single running."

The witness Wherry testified (Tr. 258), "My instructions were to put two elevations in, one on each side of where I actually was, in order to indicate a double run."

The compassman Layton testified (Tr. 389), "In doing topographic work I did not put in the elevations on the forty lines as specified in Mr. Nease's written instructions to cruisers, because Mr. McKay told me to put four or more elevations on the forty, at points so that the four elevations would be an equal distance from the center and sides of the forty."

ALTERATIONS AND CHANGES MADE IN THE OFFICE.

We find that not only was the work of the timber cruisers inaccurate and deceitful, but flagrant changes without consulting the cruiser were made in the office. The witness Murray heard Nease tell Fulton (Mr. Fulton was chief clerk for Nease) to raise a cruiser's estimate a certain per cent (Tr. 323).

The cruiser, Wherry, reported 27,000 ties on section fifteen, and these were all omitted from the reports to the county. (Tr. 259).

Compassman Layton testified that he used no ink in the making of his field reports, and that "the figures 1215 under white pine (this would indicate 1,215,000 feet of white pine), the figures 140 in white fir, and the figure 100 in red fir, and the figure zero in the spruce column, all opposite the northwest quarter, I don't think were on the report when I turned it in." (Tr. 389).

He further testified (Tr. 390) that the figures would indicate that the report had been revised by a checker and that the changes were not made prior to the time the reports were turned over to Mr. Nease.

It seems rather curious that the checker would find no white pine at all on a quarter section of land without a recruise or without saying anything to the cruiser or compassman about a large body of timber as reported.

A tract of land which was owned by the state was designated on the field report turned into Nease, plainly, "State Land." (Tr. 257). This land was reported into the county and included in that for which Mr. Nease was paid.

Mr. Becker testified (Tr. 474) that when he examined the report in Portland it bore a notation in lead pencil to the effect that it was "state land" and that the notation at the time of the trial had been erased and was not noticeable except by the aid of a glass.

Mr. Nease testified (Tr. 326), with reference to the erasure of this notation that only he and Mr. Fulton had access to the reports since they were examined by appellee's attorneys in Portland. The facts disclose, however, that they were even doctoring up these field reports and making changes and erasures long after the suit had been started and long after they had been examined by the attorneys

for the appellees and before they were exhibited in court at the trial.

The witness, Albright, worked for Mr. Nease in Portland in the office assisting in making up reports, copy work, putting in some elevations on some of the drafting, and *jibing* the sections and townships. Witness stated, "By jibing the sections, I mean connecting up all creeks, outlines, burns, etc., where they cross a section and township line. In doing this I had to make changes in the creeks, outlines and burns and also elevations in order to reconcile the reports, and I made such corrections on the original field reports." These reports were all made in lead pencil, and the cruisers were instructed to make them in lead pencil. Changes, alterations and corrections in the office made by an expert draftsman might be very hard to detect a year or so after the work had been done. These original field reports were written in the office of Mr. Nease in Portland, Oregon, and the results of the work as finally "jibed" and smoothed out were delivered to the county long after the men had quit work and been discharged. In this class of work quite generally the field report would come in with nothing said about logging conditions or any of the "write-up," and instead of referring the field report back to the cruiser for atten-

tion, the boys in the office just wrote it up to suit their own ideas. They made it look very pretty on paper, but founded it on nothing more substantial than the imagination of the office clerk who happened to be making the particular write-up. They even furnished an imaginative description of the timber from the size and amounts given. (Tr. 367).

Take the field report of the cruiser Penegor; where he found 16,000 feet of white pine, it was scratched off and not reported in the estimate to the county. (Tr. 445).

Changes were made in the elevations of Penegor's reports (Tr. 447), and the percentage of clear timber on section 36-41-1E was raised from ten to sixty, and the witness knew of no reason why the change should have been made.

The witness, Morrow, testified (Tr. 284), "I heard Mr. Nease make the remark to Mr. McKay that he did not see any timber on the south half of section 21-39 range 6E. Then Mr. McKay took a sheet and went out into the other room and when he came back he said 'there is something on there now.'"

The cruiser, Croman, testified (Tr. 451) that certain figures and interlineations on his report were written by someone else and that portions of the

write-up which were stricken out in pen were not done by him, and that a further notation "damaged by fire,....." was not put on the report by the cruiser. This seems to be taking considerable liberty with the work of the cruiser: nevertheless it was part of the Nease system.

Where Morrow had found 690,000 feet of fir, his report had been changed in ink to 75,000, and where he found 410,000 feet of cedar, the figures had been changed in ink to 125,000 (Tr. 410). A large number of other changes in the reports of the witness are shown on page 411 of the transcript.

Appellant even assigns as error the admission in evidence of plats showing that Nease had fraudulently changed the work and reported to the county different figures than were given to him by his cruisers, and the flagrant differences are set forth in the specifications of error (Tr. 778 and in appellant's brief p. 37). This exhibit plainly shows that Nease deliberately failed to report to the county the timber that was found by the cruiser.

WORK IN THE FIELD.

The witness Albright testified (365) that they changed from double running the land to a single run "upon the orders given me personally at Elk

River by Mr. Nease * * *. He asked me if we were double running and I told him that we were, and he told me to tell Mr. Weir to single run the balance of the time. I so told Mr. Weir."

It took them a week to cruise 1000 acres by the double run method, and by single running they cruised 7600 acres in 23 days (Tr. 366).

Nease demanded a written statement to the effect that the work had been done by the cruiser in accordance with the written instructions, when in truth and in fact he had verbally instructed them to do the work otherwise. (Tr. 369).

Nease gave the cruisers the impression that acreage was the main thing wanted, regardless of the quality of the work. (Tr. 268).

The written instructions to cruisers required them to make an N at each section corner and quarter corner, but Nease positively instructed Wherry to cease marking corners with his own name (This would permit a checker to know whether a cruiser had been at the particular corner) or else to vary his mark (Tr. 257). Nease instructed his men in the field to get acreage and get through as quickly as possible (Tr. 259). The witness also testified that

he failed to find the letter N marked up by Nease's cruisers. (Tr. 266).

The field books containing the original work done by the cruisers were written by them, and these were not even turned in to Nease (Tr. 246). The county, therefore, was furnished no original work;—just reports after they had been changed and jibed in the office at Portland.

Cruiser Randolph averaged 190 acres per day during the spring cruise, and in the fall when he was single running, he averaged 450 acres per day. (Tr. 247-8). He also testified (Tr. 48), "I cruised some farm lands taking the topography of it, *and I cruised the town of Weippe.*"

In the checking work by Wherry and Swanson, it was discovered that where Nease had reported certain land to the county as "burned over" land, Swanson found a large quantity of green growing timber. (Tr. 369).

GOVERNMENT AND STATE LAND.

The contract with Nease provided that he was to be paid for cruising all the timber on patented lands situate in Clearwater county, Idaho. (Tr. 96).

The total amount of land cruised and for which

warrants were issued, amounted to 503,997.52 acres. Of this amount 144,675.49 acres included state and government unpatented land and land platted as "untimbered" (Tr. 644-46). After the answer of the appellees had been filed, appellant commenced to see the enormous amount of acreage included in the government and state lands, for which Nease had returned reports to the county and received warrants. Explanation of the point theretofore undiscovered was difficult. However, it made an attempt, and we find that Commissioner Zelenka testified (Tr. 355) that Nease was to cruise odd pieces of state lands which had been sold under contract. "We told him that isolated tracts or pieces of government lands and state land where it was to be sold under contract, were to be cruised. The contract of April 15, 1914, was never modified with respect to the lands it was to cover * * * . The written contract with Mr. Nease was verbally modified to that extent. We usually accepted the suggestion of the assessor in connection with this contract of Mr. Nease. He recommended that these government lands and state lands be cruised."

The plat furnished the cruiser Murray by Nease instructed him to cruise state and government lands

(Tr. 374). These plats were colored so that the government land was indicated in brown and the state lands in red. Nease told the witness Randolph not to cruise any state lands shown on one plat, but that he was to cruise four government forties. (Tr. 248).

Commissioner Harrison testified (Tr. 298), however, "I did not know that he was cruising and charging for lands in the forest reserve, nor for power site along the North Fork of the Clearwater river that were not subject to entry at the land office. I know nothing about what land he was cruising, any more than when he brought in his reports we always saw the assessor and checked up with the assessor. Some report was filed before the board or we just asked Mr. Blake if the check was all right and he said it was. * * * * . We took the assessor's word for it and allowed Nease's bills on the assessor's approval." (Tr. 298).

Commissioner Zelenka testified (Tr. 357) "Sometimes the bills were not checked by the board with the plats because it was pretty hard for us sometimes to go over all of that work, but it was O. K'd. by the assessor and supposed to have been checked exactly."

Nease testified (Tr. 343) that he was told by the

board to include small tracts of government land in the cruise. "The idea being that this land either had been entered or had some sort of scrip filing, or would in the near future pass to patent, and it would then be more expensive to go back and cruise them separately. They did not designate to me specifically what government land I should cruise."

Here Mr. Nease says that he was to cruise only such government land as had some sort of filing and such tracts as might be subject to in the near future pass to patent. Large quantities of land along the North Fork of the Clearwater river had been withdrawn from entry by the federal government for power site purposes and were not subject to entry. This land was cruised by Nease's men, estimates turned into the county, bills allowed therefor, and warrants drawn. There certainly seems to be no valid excuse at all for such work as this. Nease testified (Tr. 350), however, "I did not know at the time I filed my bills with the county commissioners that any of the lands I charged for were embraced in power site withdrawals and not subject to entry, and I do not now know such to be the fact."

Assessor Blake says that Nease was instructed to cruise state and government lands (Tr. 421). How-

ever, Mr. Nease himself testified (Tr. 343) "I did not instruct any of my cruisers to cruise any of the state lands. If any of the state lands were cruised in the work it was through error * * *. There might have been some few pieces of state lands cruised by mistake of the cruisers * * * it was not my intention to cruise any nontaxable state lands, and when I speak of state lands, I mean nontaxable state lands."

Here Mr. Nease contradicts and nullifies the other testimony to the effect that the contract was orally modified.

Notwithstanding this testimony, we have the undisputed fact that a large quantity of state and government lands, viz. 34,386.37 acres, was included in the Nease reports and for this work he received warrants in payment (Tr. 644-6). Nease, however, told Cruiser Wherry (Tr. 257) that "whenever it was convenient to cruise an 80-acre or 40-acre small tract of state land, to cruise it and turn it in"—that they could "get by" with that much." Nease also told Cruiser Layton (Tr. 392) that he could work in a certain amount of state or government land and "he told us that in going over such land, enough to make an estimate, to do so if it was timbered, but if it was not timbered to pay no attention to it." It

seems that Nease not only had great confidence in his ability to "get by" with a certain amount of state and government land, but that he actually did work it through the assessor's office and received warrants in payment therefor. This was contrary to the contract and was done in such a way as to deceive the county commissioners and defraud Clearwater county.

Not only did they cruise and turn in estimates and receive pay for cruising farm lands, burns, marshes, government and state unpatented lands, but they cruised the town of Weippe, situate on the prairie. (Tr. 351).

Appellant apparently conceding the fraudulent and deceitful work of Nease in cruising and charging for state and government land, devotes ten pages in its brief (pp. 78 to 88) to explanation and mathematical computations for the purpose of arriving at a proportionate amount to be deducted from the warrants in the instant case, by reason of the fact that approximately 20,000 dollars worth of warrants had been paid before the discovery of the deceit and fraud practiced upon the county—in other words, the appellant rather admits that a certain amount of government and state land was worked off on the county, but since it had been discovered, and because

Nease might have been paid for some of this fraudulent work, appellant has the temerity to ask that that be whitewashed, ratified, and that it only be called upon to deduct for such portion of state and government land as is shown by the figures in the brief. There is nothing which would accurately show the amount of state and government land included in the warrants in this suit.

We think that the court would not assume the position of expert accountant to protect the appellant in its claim for pay for fraudulent and deceitful cruises in Clearwater county. The foregoing evidence conclusively shows that ample fraud and deceit was practiced upon the board of county commissioners and Clearwater county, notwithstanding the fact that the county assessor might have been aware thereof, to vitiate the entire contract. Clearwater county and the county commissioners did not know that Nease was working all of this land in on them and had no reason to suspect it.

CHECK BY THE COUNTY.

In order to make a showing of good faith, the county assessor deemed it advisable to employ a cruiser to check the work of the Nease men, and Mr. J. F. Gorman (a then resident of Spokane, Wash.)

was hired by the county as its checker. Mr. Gorman was a deputy assessor and made his report to the assessor. Mr. Harrison testified "We inquired from time to time of the assessor how they were getting along and he reported that everything was checking out all right, and that they were cruising the proper lands."

It is necessary that a checker go through the land in the same way that the cruiser did or it would not be a fair check on his work. (Tr. 379).

Taking into consideration the testimony heretofore cited, showing that equally thorough and competent cruisers will vary from ten to three hundred per cent on the same land, on account of perhaps having gone through a different way, and taking into consideration the further testimony that no two cruisers ever get the same amount on the same land, and taking into consideration the further uncountable number of discrepancies found in the Nease cruise, one would naturally suppose that the county checker might, in work extending over the entire summer, find something of a discrepancy in the work of the Nease men of sufficient magnitude to warrant him in calling it to the attention of the county assessor or the board. Not so with Gorman. The as-

sessor all the time reported to the board that everything was checking out all right

The deputy assessor (Mr. Gorman) was a business associate of the assessor (Mr. Blake) (Tr. 410) and they were both directors in the Fidelity State Bank of Orofino—the county seat of Clearwater county. Mr. Blake was a cashier of that bank (Tr. 396). When the checker, Gorman, brought reports into the office of the assessor Blake, these reports of checkings were not delivered to the county commissioners but were immediately taken over to the vaults in the bank (Tr. 394). They were never exhibited to deputy assessor, Molloy, and they were not kept in the office as long as deputy assessor, Molloy, was there. They never discussed these reports in the presence of Mr. Molloy and they were never filed in the assessor's office and were never left around the office (Tr. 394).

Commissioner Harlan testified "I have looked in both the recorder's and the Assessor's office and made inquiries of the clerk of the board and the assessor and have been unable to find any such reports * * * * but there was no report we were able to find in respect to any check he made against the Nease cruise." (Tr. 371).

In the winter of 1913 and 1914 this checker, Gorman, had made a cruise, or estimate, of Sections 19, 20-36-4 (Tr. 411) and this was filed in the office of the assessor, yet the assessor permitted Nease to go ahead and recruise this same land.

The assessor checked up the Gorman reports and O.K.'d them, and also his expense account. (Tr. 362).

Commissioner Torgerson testified (Tr. 401) "When we found that Mr. Nease had completed his work and check with the assessor, I went up to the assessor's office and talked with Mr. Blake about it and he said he had carefully checked everything and that as near as he could see, everything was all right * * * inasmuch as Mr. Blake was a county officer, and I believed he would do the best he could and had done right, that it was all right."

Commissioner Harrison testified (Tr. 311) "I did not see Mr. Gorman's reports when they came in, but allowed his bill on the recommendation of the assessor, as Gorman was a deputy assessor."

Mr. Gorman testified, (Tr. 409) "I turned over my reports to the assessor of Clearwater county. They were in ten plat books numbered consecutively from one to ten and they show all of my work * * *

I filed my reports with Mr. Blake, the county assessor at Orofino, and I have not seen them since."

From some note books the witness had with him, defendants found large discrepancies between the reports as turned in by Nease and the record he made (Tr. 408, 409); and he could not tell why the estimate of Section 21 as turned in to the county was not rectified in accordance with his report. (Tr. 410). In fact there is no record of any rectifying ever having been done as a result of the report of this checker.

Assessor Blake testified, (Tr. 422), "I recall there were some discrepancies shown in checking up Mr. Gorman's reports with Mr. Nease's work. I took no action with reference to them that I remember of. I made no change in Mr. Nease's estimates on account of Mr. Gorman, that I know of. I did not consider I had any authority to make any changes in Mr. Nease's work."

The assessor told the individual county commissioners, however, (supra) that Nease's work was checking out all right; that everything was fine. Assessor Blake further testified (Tr. 423), "There were some of Mr. Nease's men, two or three of them, whose work was not satisfactory. I did not do any-

thing about it; I think Mr. Nease let them out. I did not ask him to make a recruise on that land."

NEASE AND THE TIMBER COMPANIES.

In so far as the interests of the county were being protected by Assessor Blake and a checker, we find that notwithstanding the fact that there was plenty of room to find discrepancies and incompetent work, nevertheless nothing was done, and no errors were reported to the county commissioners. The timber companies, however, against which this cruise was apparently directed, and whose power was greatly feared, were continuously in consultation with Nease at Spokane, Lewiston and other places. On the 28th day of April, just a short time after the letting of the second contract, is the first record we have of Nease and the timber companies becoming friendly, and a telegram from Mr. Humiston to Mr. Nease bearing date May 10th, says (Tr. 665) "Referring to your proposition of the twenty-eighth ultimo, let me request that you name a time when we can meet in Spokane to check some of your Latah county estimates before turning them in. I now have some interesting reports on the work of your cruisers which will be submitted to you at the time we check estimates. Suggest that this matter

be given prompt attention." signed "W. D. Humiston."

We call the court's attention to the fact that the suit instituted in the name of John Lewis was commenced at the instance and request of Theodore Fohl, the agent for the Clearwater Timber Company (Tr. 318), and that Mr. Lewis stated (Tr. 319). "I had nothing to do with the institution of the suit which was brought in my name, nor with the dismissal of it."

While Assessor Blake deemed it necessary to have a cruise of timber land for assessment purposes, nevertheless, apparently because John Lewis brought this suit, the latter's 300 acres of timber land which before had been assessed at $3000.00 was raised in the latter part of June to $10,000.00 (Tr. 318-9).

Appellees contended that while the suit was undoubtedly brought in good faith to stop the cruise, that before cruisers were again put in the field in August, an amicable agreement had been reached between Nease and the timber companies and it was deemed advisable to leave this suit pending to prevent other people from taking similar action. This suit was not dismissed by the timber companies until the completion of the Nease cruise.

Mr. Nease testified (Tr. 334) that when his men returned to work the first of August "I had then no definite information about the dismissal of the suit. The timber companies interested in Clearwater county had said to me that all they wanted was a square deal." It appears that the suit and the appeal from the action of the board of county commissioners were kept alive as a club over Nease until the timber companies had had an opportunity to check up his cruise and see what he was going to report to the county, so that they could tell whether or not they were going to receive a "square deal."

Nease testified, however, (Tr. 334), "I had a conference with Mr. Humiston, the representative of the Potlatch Lumber Company, in Spokane and in Portland and in Lewiston, and on the train, and the suit was generally discussed. I think I first talked to them about it in June. There was no agreement to dismiss it entered into. There was no reason why there should be an agreement. They stated sometime along in the summer that they were going to dismiss the suit."

Mr. Nease referred to his meeting with Mr. Humiston in April, when this suit was discussed, and Mr. Humiston asked Nease to come to Spokane. Nease

testified (Tr. 341) "He says 'it might be advisable for you to meet them, if you wouldn't be afraid to meet them.' I says, 'I have no fear of meeting them at all.' I said, 'I would very much like to meet all parties interested in this litigation and discuss it all, because litigation is expensive and very disagreeable and unpleasant.' So at a later date I received a wire from Mr. Humiston,—I am not sure about that wire, but anyway it is immaterial."

This must be the meeting referred to in the telegram (Deft's. Ex. 28, Tr. 665) supra. Mr. Nease admits that he met representatives of the timber companies frequently and that they frequently discussed this Lewis suit and the cruising of timber in Clearwater county, and that they had promised to dismiss the Lewis suit in the summer. It was not dismissed, however, until October 13th, 1914. About the time the cruisers were leaving the field and Nease was ready to submit his books to Clearwater county he commenced to get uneasy because the Lewis suit had not been dismissed, and on September 8th he wired Mr. Laird at Potlatch (Tr. 663) "Case has not been dismissed as agreed at Spokane conference. * * * "

When was the Spokane conference and what was the agreement?

On October 27th (Tr. 666) Nease in Portland wired Mr. Humiston "Work completed, ready for comparison here October thirtieth and thirty-first November first second." And on the next day (Tr. 666) he wired Mr. Humiston: "Bring figures entire county. We have every township in the county finished. When in Lewiston please call on president Empire National Bank and assure him of legality of cruising warrants explaining to him history of litigation and dismissal.''

What interest did Mr. Humiston have in these cruising warrants? Why should he be called upon to give his personal assurance to a bank in order to bolster up the question of legality of the cruising warrants? Why should Mr. Humiston be called upon to explain to the bank the history of the litigation and the dismissal. Mr. Humiston was not before the court and we can only draw our conclusions from the interest that the timber companies were taking in this cruise with Mr. Nease.

Mr. Nease gave a partial explanation of why he sent these telegrams (Tr. 336), and he stated: "The purpose of these comparisons was to see how close we ran together and to see if they desired to take advantage of the arbitration clause in the contract or to have a recruise in some manner."

This arbitration clause (Tr. 99 Par. 6) provides:

> "It is further agreed by and between the parties hereto that in case any cruise made by the second party, as shown by his reports, shall be disputed and the owner of the timber so cruised desires to have the same recruised * * * * * * then arbitrators shall be appointed, and if the recruise varies more than 20 per cent of the amount shown by Nease, then the expense shall be paid by him, otherwise by the county.

We call the court's attention to the fact that under this agreement a *timber owner* was the only individual who could complain or request that a recruise be made, and unless such request was made, the county had to accept the cruise.

Nease was allowed a 20 per cent variation, but had his cruisers tied up to a 15 per cent variation (Tr. 113-14) and in that case the cruiser had to bear the expense of a recruise.

The obvious effect of such a clause would be to make assessments low enough so that no one would complain. The cruiser well knew that, taking into consideration all the traits of the ordinary individual, no complaint would be made if less timber were reported to the county than was actually growing upon the tract; hence the large number of under estimates by the Nease men.

It will be noticed that the cruise turned in by Nease was evidently so low and eminently so satisfactory to the timber companies that in not one instance did they ask for a recruise or a recheck. Why were not the individual owners also called into consultation and given an opportunity to show how the Nease cruise compared with their estimates, if any, before these reports were delivered to Clearwater county?

The Nease reports were checked by all of the timber companies (Tr. 337). Mr. Nease explained the lead pencil figures and letters which were on the field reports showing these comparisons (Tr. 327); for instance, referring to field reports on section 12,-39-3E, the comparison figures showed that the Clearwater Timber Company had found 2,495,000 feet of white pine on the northwest quarter, where Nease had reported only 745,000. Many more instances are cited and are in evidence, but it will serve no purpose to cite more of them; it simply shows the trend of the Nease cruise.

If the objection to letting the contract to persons who offered to do the work much cheaper than Mr. Nease, raised by the commissioners on the ground that these parties had worked for a timber

company, were valid, then the Nease cruise deserves no recognition, for the record shows that before the cruise was completed and before the results were delivered to Clearwater county, Mr. Nease had became an associate of these same timber companies. The Lewis suit and the Lewis appeal were dismissed on the 13th of October, 1914, (Tr. 106). The time then for filing appeal from the action of the board of county commissioners had expired and nothing could have kept other interested taxpayers from contesting the validity of the contract better than the keeping of this suit and the appeal on the docket as apparent live issues.

Mr. Harlan testified (Tr. 321) "I advocated letting the contract through competitive bids, and we were thinking of appealing from the action of the board, but thought it was not necessary for us to brings any action because Mr. Lewis had already taken action in the matter."

If the timber companies had dismissed the Lewis suit immediately after making the agreement therefor with Nease at the "Spokane Conference" there is no doubt but that other interested taxpayers would have started another suit at once and in good faith presented all of these legal questions to the court.

ARGUMENT.

We will endeavor to follow the order and reply to the argument of appellant as presented in its brief.

Appellant's contention is that a cruise of the growing timber upon timbered lands is indispensable to enable the assessor to arrive at a true valuation of the timbered lands in the county and unless this proposition is firmly and clearly established, appellant's case must fail. One of the major defenses sustained by the lower court is that the cruising of the timber (which is in effect a listing of the property) was performed by non-residents of the state of Idaho, who were neither assessors nor deputy assessors, contrary to the Idaho law. This point is argued under specifications of error, II (A), beginning at page 47 of appellant's brief. Appellant says (page 48) "It is conceded that the cruise was made for the use of the assessor and the board of equalization in assessing the timbered land of the county for the purpose of taxation." Appellees make no such concession. We admit that the assessor demanded that the county commissioners arrange for a cruise of the timbered land and that a contract between the county and M. G. Neasc was entered into

for that purpose, but we deny the conclusion that the cruise was made for the use of the board of equalization in assessing timber lands.

It must be conceded that where the statute specifically requires that a certain method be followed, other and less formal methods must be excluded. "When the constitution devolves a duty upon a particular person, the legislature may not substitute any other person to perform that duty." Bloomquist v. Board of County Commissioners, 25 Idaho 284-293. The statutes of Idaho have specifically declared that whenever an assessor shall require assistants that advertisement shall be made and the salary fixed by the board.

Section 2119 of the Revised Codes of Idaho, as amended by chapter 127 of the Laws of 1913, (page 474):

> "The sheriff, assessor * * * * * shall be empowered by the board of county commissioners to appoint such clerical assistance as the business of their office may require, and deputies to receive such remuneration as may be fixed by said board of county commissioners, which remuneration shall be paid quarterly in the same manner as the salaries of the county officers are paid: PROVIDED, That any of the officers mentioned in this section requiring the services of one or more deputies or requiring clerical assistance shall, for a period of at least thirty

days before any regular meeting of the board of county commissioners, publish a notice in some newspaper at the county seat, or if no newspaper is published at the county seat, then in some other newspaper published in the county or if no newspaper be published in the county, then by posting a notice in his office for a period of thirty days before said regular meeting, of his intention to apply to the board of county commissioners for a deputy or deputies or for clerical assistance, and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown, and any tax payer in the county shall have a right to appear before said board and protest against said appointment and show cause why said assistance should not be allowed."

Section 6 of Article 13 of the Constitution of the state of Idaho provides that

> "The Legislature, by general and uniform laws, shall provide for the election biennially in each of the several counties of the state * * * * a county assessor who is ex-officio tax collector * * * * * *."

It goes without saying that the reason for the enactment of this law was to prevent county officials from giving employment to favored persons at exorbitant salaries, and in the present case, as near as appellees could determine, the Nease cruise cost only about eighteen thousand dollars, and the timber land

could have been classified, and the burns, marshes and clearings located (without a cruise) for perhaps two thousand dollars, with a saving to the county of about sixty-one thousand dollars.

Appellants admit and the record proves that the assessor and the county commissioners did not in any manner attempt to follow the provisions of the foregoing statutes. This was not on account of inadvertence or lack of knowledge, but by a wilful and intentional attempt to evade the mandatory provisions of the law. The requirements thereof had been brought to their knowledge by the allegations in the John Lewis suit, so that they had ample time to protect the county in the expenditure of its funds if they so desired.

Appellant argues that a cruise is necessary for the use of the assessor and the board of equalization. He fails to carry the distinction between the duties of the assessor and the board of equalization.

> "Before taxes can be levied upon any property the property must be assessed; that is, the property must be listed for taxation. Under our constitution this duty devolves upon the officials whose title of office indicate that duty; to-wit: the assessor. And where the constitution provides a scheme or frame work for the mechanical administration of the laws of the state the legislature can-

> not substitute another method therefor." "The assessor is required to assess the property in his county at its actual cash value according to his honest opinion and best judgment and if the opinion of the tax commission is different from that of the assessor, the tax commission cannot compel the assessor to change such assessment and conform to the opinion of the tax commission."
>
> Bloomquist v. Board of County Commissioners, 25 Idaho, 292-3 Supra.

The argument of appellant that the board of county commissioners would be authorized to go in debt to have a cruise of the timber lands made in order to enable it to perform its functions as a board of equalization is absolutely without merit. Even with the most accurate cruise and estimate made, it could not, if its opinion differed from that of the assessor, compel the assessor to substitute its opinion for that of the assessor so long as the assessor had performed his duties in good faith and according to his best judgment and discretion.

> "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the District." * * * As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the

tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed."

Cooley on Taxation 3rd Ed. p. 596.

Article 3 of Chapter 58 of the Laws of Idaho for the year 1913 requires the assessor to assess all real property in his county, and "in making such assessment the assessor shall actually determine, as near as practicable, the full cash value of each tract or piece of real property assessed and shall enter the value thereof, and the value of the improvements thereon * * * * * * in appropriate columns against the description of such real property in the real property assessment roll."

From the foregoing provision it will be seen that it is the duty of the assessor to "actually determine." Here the law is specific, and no one but the assessor has any right or authority to even list or attempt to place a valuation upon the property in the county. By this section the assessor is only required to place a valuation upon such property "as near as practicable."

"The words "assessor" and county "board of equalization" as used in *the constitution*, carry with them the powers usually conferred upon officers or boards of like names. Under Sec. 6, Art. 18 of the constitution, *it is essential that the assessment of property located wholly within a county shall be made by the assessor*

elected by the voters of the county, and if the assessor has no discretion in placing a value upon the property assessed, he is nothing more than a listing officer, without any power to assess property at its cash or any other value according to his best judgment or legal discretion." * *

"Before taxes can be levied upon any property, the property must be assessed; that is, it must *be listed and valued for taxation. Under our constitution this duty devolves upon the officers whose title of office indicate that duty, to-wit, the assessors.* The legislature cannot assess property nor can any appointive board assess property for taxation under the constitution of the state of Idaho, and the essential duties of an assessor and a county board of equalization must be preserved until a change is made by proper amendments to the state constitution. Bloomquist vs. Board of County Commissioners, 25 Idaho, 284-292.

The Nease cruisers not only acted as listing offiers in cruising timber for the assessor, but also exercised their own judgment as to whether or not property should be listed at all. In these particulars, they clearly usurped the functions of the county assessor. He had no opportunity to exercise that discretion devolved upon him by the constitution of the state of Idaho.

Appellant argues that because the assessor is required by the laws of Idaho to assess lands "at their full cash value" that it is absolutely necessary

to have growing timber on timber lands cruised to enable the assessor to arrive at that valuation. Appellant states the proposition but does not prove it. Assessors have always been required to assess property at its real value,—cash value or true cash value,—but the method of arriving at such valuation has been left to the honest discretion and best judgment of the assessor. And when the assessor has so acted, the result cannot be questioned. Real estate, under the laws of Idaho, is divided into different classes for the purpose of assessment, and a portion of chapter 58, laws of Idaho, 1913, provides:

> Section 48. "For the purposes of assessment lands shall be classified as follows:
>
> "A. Agricultural land, being land used or susceptible of use for general agricultural purposes, including land in use or susceptible of use for orchard or vineyard purposes, and land used or susceptible of use for scientific dry farming.
>
> "B. Timber land, being land on which there is standing timber of commercial quantity and quality.
>
> "C. Cut-over and burnt timber land, being land from which timber has been cut or burned, leaving nothing but stumps and burnt timber, and which burnt timber is not at the time of the assessment useful for any commercial purpose. Where timber land is held under separate ownership from the timber thereon the land itself shall be classified under this heading.

"D. Mineral land, being land used or susceptible of use for mining.

"E. Grazing land, being land not used or susceptible of use for agricultural purposes and which is useful only in large areas for stock grazing.

"F. Waste land, being land not susceptible of use for agricultural or commercial purposes.

"Lands in cities, towns, villages and townsites:

"G. Business lots, being such lots as are situated in a commercial section, and actually used, or best susceptible of use for business purposes.

"H. Residence lots, being lots in a generally settled residence district, and lots platted for residence purposes.

"Section 49:

"* * * * * The assessor shall exercise his best judgment in classifying land in accordance herewith, but the classification made by him may be amended or revised, and a new classification made, or the classification of any particular tract or lot changed by the Board of County Commissioners, if in the judgment of such board such land has not been correctly classified in accordance with the provisions of the preceding section."

"Section 50:

"In case standing or growing timber is owned separately from the ownership of the land on which it stands or grows, such timber shall be entered upon the real property assessment roll

separate and apart from the land, and the number of acres and the value thereof entered in columns provided for that purpose."

Sec. 6. Real property for the purposes of taxation shall be construed to include land, and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand, and all buildings, structures and improvements, or other fixtures, of whatsoever kind on land. * * "

Sec. 8. "By the term "improvements" is meant all buildings, structures, fixtures and fences erected upon or fixed to the land, and all fruit, nut-bearing and ornamental trees or vines not of natural growth, growing upon the land, except nursery stock."

Section 48 supra, requires the classification of land but does not say that improvements or growing trees shall be counted listed, or assessed by any particular method. If appellants argue to the effect that it is necessary to count and list the number of board feet of growing timber on timbered land, then with equal force may we argue under the provisions of section 8 supra, that it would be necessary for the assessor to compute the actual value of fences, and count, weigh, or measure all of the nuts on nut bearing trees and all of the fruit upon the fruit trees, and also measure or weigh the produce upon the agricultural land so that he might determine whether one quarter section of wheat land should be assessed

at a very different valuation from an adjoining section. The law does not require the assessors to have annually such detailed and expert opinion in order that they may make their assessment.

> "VALUE, HOW ASCERTAINED. As to the methods of arriving at the value, little is to be said. There are no definite rules on the subject unless the statute has prescribed them, but the assessor is to value the property according to his best judgment and with honest purposes."
>
> Vol. 1. Cooley on Taxation 3rd Ed. p. 754.

In Peninsula Iron vs. Crystal Falls Township 60 Mich. 510, it is held that the assessor is not required to perform impossibilities and that he need not examine personally each parcel of land in a township, and an assessment of "uncut" land uniformly through the township at a certain price per acre was sustained.

In Keokuk & H. B. Company v. People, 161 Ill., 514, it is held that where the statutes provide that certain bridges are to be assessed as real estate that the assessor shall actually view and determine *as nearly as practicable* the fair cash value of real estate listed for taxation, the assessor need not employ bridge experts for the purpose of ascertaining the value of the bridge.

In the mak ing of assessments of real property we must take into consideration what is required of the assessor and a reasonable way to perform his duty without making the cost of such performance a burden in itself. It would not be good business to annually spend more for

expert assessors than the tax to be recovered therefrom was worth.

From the Idaho statutes on the assessment of real property, it conclusively appears that all the statute requires is that the property be classified and that after such classification has been made the assessor shall determine "as near as practicable the full cash value." The assessor must also determine the value of buildings and improvements. Two buildings side by side on the same street with the same frontage might have an outward appearance which would make them of equal value and might have floor space which would make them of equal rental value. The one might be weakened and nearly ready to fall down and the other one might be of recent construction and in condition to produce rentals and income for a period of from 40 to 50 years. Would it be supposed that the assessor should hire architects and builders to annually examine each building to determine its true cash value? Certainly not. He is only to value them as he sees them and make an honest endeavor to place a valuation according to his best judgment.

Appellant with great candor states in its brief (page 57) that the assessor may secure information from any source in order to enable him to make a

proper assessment of property. This is true. He is given wide latitude and discretion in listing, classification and valuation. He can inquire of his next door neighbor or anyone else, or he may be satisfied with the opinion of the owner as is stated by the appellant, but if the assessor is unable to make lists and valuations either from his general information or from the sworn statements made by the property owners, together with the information then before him, he is authorized to hire or employ deputies to assist him in this work. He must comply, however, with the laws of 1913, chapter 127 supra.

The county assessor of Kootenai county also prevailed upon his commissioners to enter into a contract with one Pelham for the cruising of timber lands in that county. Action was brought by J. C. White against the Board to prevent the payment of certain warrants which had been issued to Mr. Pelham for estimates on timber land on the ground that the board had not followed the law with reference to making the appointment, and fixing the salary of the deputies; and that the cost of such work exceeded the income and revenue of the county in violation of Section 3, Article 8 of the Idaho Constitution. The assessor in this case, however, had made an honest attempt to comply with the law with reference to

the publishing of notice for the appointment of deputy assessors, and it was his intention that Pelham and all persons cruising timber should be sworn in as deputy assessors. The action came on for trial and the district court sustained the contention of the plaintiff and held the warrants illegal and void. Decree was signed by the Hon. John M. Flinn and filed May 11th, 1914. The court in its decision reviews the facts and says:

"Our Supreme Court states:

> 'Section six of article eighteen evidently contemplates that a necessity may arise for the appointment of a deputy sheriff. It also contemplates that, when it is made to appear to the county commissioners that the services of a deputy are necessary to the proper conduct of the business of the sheriff's office, they may empower the sheriff to appoint such deputy and may fix the salary of such deputy. However, before the county commissioners are authorized to empower the appointment of a deputy, they must find that the business of the office requires the assistance of one.'

'Or, in other words,' as was said by the court in the same case: 'That a necessity exists for the appointment.'

Taylor v. Canyon County, 6 Idaho, 466.

"Other cases recognize the principle that the ne-

cessity for appointment must be found, and are the following:

Cohn v. Kingsley, 5 Idaho, 416.

Dunbar v. Canyon County, 6 Idaho, 725.

"In view of the foregoing constitutional and statutory provisions as construed by our own supreme court, it is apparent that before any of the officers mentioned can employ deputies, or procure clerical assistance, *they must be empowered by the board of county commissioners to appoint such deputies and clerical assistance.*

"It is further plain that the remuneration of such deputies must be fixed by the board of county commissioners and paid in the same manner as the salaries of county officials are paid."

STATUTORY ASSISTANCE AND INSTRUCTIONS FOR THE ASSESSOR.

"Sec. 15. In ascertaining the value of any property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation * * * but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

"Sec. 16. The assessor shall call at the office, place of business or residence of each person required by this Act to list property, if such person is a resident of the county, and shall require such person to make a correct taxpayer's statement of such property, in accordance with the provisions of this Act; and every person so required shall enter a true and correct state-

ment of *such property and the ownership thereof in the form prescribed, which statement shall be signed and verified by the oath of the person listing such property, and shall be delivered to the Assessor, who shall thereupon determine the value of such property and enter the same on the assessment roll*; * * * " (p. 179).

Sec. 20. Any property, wilfully concealed, removed, transferred, misrepresented, or not listed by the owner, or the agent or representative of the owner, to evade taxation for the current year, or in any preceding year or years, must upon discovery be assessed at three times its value for each year such property has escaped assessment, and the assessment so made must not be reduced by the Board of County Commissioners. (p. 180).

Sec. 21. If any person required by this Act to list property shall be sick or absent when the Assessor calls for a taxpayer's statement of such property, or if such person is not a resident of the county, the Assessor shall leave at the office, place of business or residence of such person, or mail to such person at his last known post-office address a blank taxpayer's statement and a written or printed notice requiring such person to make out and deliver to the assessor, on or before some day named therein, the statement required by this Act. If such person failed to make out and deliver such statement as required, the Assessor may list and assess such property according to his best judgment and information. (p. 180).

Sec. 22. The assessor is hereby authorized to administer oaths to all persons who, under the provisions of this Act, may be required to swear, and he may examine under oath any per-

son who is required under the provisions of this Act to list property, concerning the amount and value of such property, and he may examine under oath any person whom he may suppose to have knowledge of the amount or value of the property of any person refusing to list such property or to verify such list as provided by law, or whenever the Assessor shall be of the opinion that the person listing the property for himself or for any other person has not made a complete list of such property. If any person shall refuse to answer under oath any question asked of him by the Assessor concerning the amount and value of the property required to be listed by him, and a full discovery made, the assessor may list and assess such property according to his best judgment and information. Any person making a false list, schedule or statement under oath shall be guilty of perjury. (p. 180-1.)

The evidence shows that before Mr. Nease delivered the result of his cruise to Clearwater county representatives of all of the timber companies assembled in Portland, Oregon, and compared their cruise with Mr. Nease's and found that the estimates of the timber companies were in practically all instances much higher than the Nease cruise indicated. The foregoing sections give the assessor ample authority to require these timber companies to bring their estimates and submit them to him, if, under the law, it was necessary for the assessor to know the quantity of standing timber on each individual tract.

THE IDAHO TAX COMMISSION.

It is conceded that only a very small portion of timber in the state of Idaho was, or ever has been, cruised for assessment purposes. At the time of the enactment of the laws which appellant contends imposed such drastic duties on the assessor, there was also created in Idaho a tax commission which commission was empowered to supervise the administration of all laws relating to the assessment of property and levy of taxes—see Idaho session laws, 1913, chapter 57, page 168, et seq.

> Sec. 1. There is hereby created for the state of Idaho a State Board of Tax Commissioners to be known as the "Idaho Tax Commission," and the said Board shall have and exercise the powers and perform the duties hereinafter prescribed.
>
> Sec. 8. The Commission shall supervise the administration of all laws relating to the assessment of property, and the levy, collection, apportionment and distribution of taxes, and shall exercise power and authority to enforce all such laws, and in so doing shall oversee all boards of assessment, boards of equalization and all officers upon whom any duties devolve under the revenue laws of this State, and require all such boards and officers to perform the duties imposed upon them by such laws, and may examine all books, records and accounts of such boards and officers, and require such boards and officers to furnish the commission such records, data and information

as may be had from the records in their several offices and as the commission may deem necessary. (p. 169).

Sec. 11. Any taxpayer or officer in this state shall have the right to make complaint to the Commission, of the failure or neglect of any officer upon whom any duties devolve under the revenue laws of this state, to perform such duties. (p. 170).

Sec. 9. The *Commission shall prescribe a uniform system of procedure in the assessment of property* and the levy, collection, apportionment and distribution of taxes, and shall prepare and supply to the State Auditor the forms of all books, records and blanks required by the revenue laws to be used *and no other system* or forms shall be used than those prescribed by law and prepared by the Commission." (p. 169). (All italics ours).

Appellants contended that section 9 supra prohibited the use of any system for the assessment of property other than the standard and well recognized methods. It is conceded and the records prove that the other counties in the state were not assessing timber lands on a cruise, and it developed at the state board of equalization meeting that while Clearwater county and a small portion of other lands had been cruised, that the balance of the state was assessing timber lands by blanket assessments. If Assessor Blake had conceived that a cruise was absolutely necessary and that he might be subject to pun-

ishment if he did not have a cruise made, it would seem that he could easily have protected himself by making application to the Idaho Tax Commission for recommendations as to a uniform system for assessing timber land, especially so in view of the mandatory provision of section 9 supra that no other system should be used. It would seem useless to carry the argument further, or cite more authority than the foregoing, to conclusively prove that the Nease contract was made in absolute violation of the then existing laws of the state of Idaho, as interpreted by the decisions of its supreme court. Taking into consideration the evidence as adduced not only by the field reports given by the cruisers to Nease and by the reports delivered to the county, and also the testimony of the cruisers themselves, the work was so inaccurate and void of uniformity that it could not be relied upon by the assessor because it was proved beyond peradventure that the cruising of the timber in Clearwater county was nothing more than conjecture. If the listing of property was necessary, certainly that listing must not consist of variations of from twenty-five to eight hundred per cent. on individual governmental subdivisions. The lower court said: "If a detailed cruise of timber lands was deemed to be essential, why was it not also required, with

proper provision for uniform reports thereof? If cruises are to be made, it is important not only that they have the sanction of law, but also that they be required of all counties, and be made and reported according to some uniform system, so that they may also serve as the basis of state equalization as well as for local purposes."

WHO MUST DO THE ASSESSING.

At page 60 of its brief, appellants refer to case of State vs. Goldthait wherein the supreme court of Indiana held void a contract for the employment of a private person to procure a particular kind of information on the ground that "The assessor was specifically required by statute to do the precise thing, (i. e., search the records) that the private party was required to do."

The contract was a direct infringement upon the functions of the assessor. "The distinction between that case and the case at bar is clear." The distinction may be clear to appellant but from the point of view of appellees it seems that the case sustains our contention. Our constitution and laws as interpreted by our supreme court (Bloomquist v. Board of County Commissioners supra decided in November, 1913) held that before taxes can be levied

upon any property, the latter must be *listed and assessed by the assessor*, and therefore no other person has any authority to exercise those functions. Patrick Blake and his duly appointed assessors were by law required to do the assessing and not itinerant cruisers from Oregon.

Page 62 refers to the suggestion of the lower court that the cruise did not have the sanction of law and impliedly argues that no cruise could have a sanction of law which would be binding upon future generations, but this leads to the other point of inquiry that if to assess land costs more than the entire income to be derived therefrom, then there is manifestly something wrong in the requirements of the statutes. The legislature certainly never intended the county to expend sixty-three thousand dollars for the purpose of collecting thirty thousand. Appellant also says that the information was secured for the county commissioners so that they would be in a position to see that the valuation placed upon each piece of property was correct. Section 62 of the revenue law referred to provides:

> "The Board of County Commissioners in session as a board of equalization may require the attendance of the County Recorder, who must furnish the said board with any information which may be had from the records in his

> office and which the said board may deem necessary in equalizing the assessment, and may also require the attendance of any other county officer or deputy whose testimony may be needed, and may also subpoena witnesses and hear evidence in all matters relating to the assessment of property, and may arbitrarily value and assess the property of any person refusing to appear or testify, and any assessment so made shall be conclusive on all questions of valuation and assessment in any court or proceeding."

This law directs that the county commissioners sit as a board of equalization, exercising the same functions that it has exercised for years. It acts as a judge and if it has information gathered from any source whatever that the assessor has in any particular instance erroneously classified any tract of land or placed an erroneous valuation thereon, it can make the necessary change. The section, however, gives an added reason why the listing of property should be performed by deputy assessors—residents of the county. It empower the commissioners to subpoena witnesses. The Nease cruise not having been performed by any assessor or deputy assessor, or resident of the state the county commissioners would therefore be powerless in any particular instance to subpoena the person who made the cruise.

Appellant quotes at length from the memorandum decision of Judge Netterer in Pacific Timber

Cruising Company v. Clarke County, 223 Federal 540, wherein the decision was rendered on a demur to the complaint and the court held, "That under the laws of Washington the county commissioners were empowered to have the timber land cruised." None of the collateral questions were presented to the court as arose in the Nease case. Under the Washington law property is not classed as it is in Idaho. In Washington, as in Oregon, the county commissioners are the chief executive officers of the county. The management of the county's business is invested in them by law. (Section 3890 R. & B. Code).

> In Idaho the county commissioners are not concerned with the assessment and taxation of property except as they are given power to "supervise" the county officers, and to sit as a Board of Equalization after the annual assessment has been made and submitted by the county assessor. (Sec. 1917). While sitting as a Board of Equalization the commissioners constitute a distinct body from the Board of County Commissioners.
>
> Gen. Custer Mining Co., 2 Ida. 40; 3 Pac. 22.

> If the commissioners have the power contended for in this case, it must be by virtue of their power to equalize the taxes rather than under the general supervision of county officers. And any contract entered into by them in the exercise of this power of equalization should be entered into by them as a Board of

Equalization and should be authorized by them while sitting as a Board of Equalization.

NEASE CONTRACT PROHIBITED BY THE PROVISIONS OF SECTION 3, ARTICLE 8 OF THE CONSTITUTION OF THE STATE OF IDAHO.

Appellant, at page 65 of its brief seeks to bring itself within the proviso of this section and attempts to prove that the cruising of timber in Idaho is a necessary and ordinary expense authorized by the general laws of the state. Section 3 of article 8 of the constitution of the State of Idaho is as follows:

> Sec. 3. "No county, * * * * shall incur any indebtedness or liability in any manner or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose * * * *. Any indebtedness or liability incurred contrary to this provision shall be void; *PROVIDED that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.*"

Appellant concedes that unless it conclusively proves that the expense for the cruising of timber was a necessary and ordinary expense under the Idaho constitution, the decision of the lower court must be affirmed. It cites the case of Wingate v. Clatsop

County, 71 Oregon 94. The constitution of the State of Oregon prohibits the creation of debts or liabilities in excess of five thousand dollars except by the approval of a majority voting on the question. The supreme court of that state has in a number of cases evaded this constitutional prohibition by an interpretation to the effect that the provision would not apply if the indebtedness was involuntary and the court kept relaxing the provision until they have decided in the case cited by appellant that an indebtedness for cruising of timber was valid. We think that the supreme court in that case went beyond the purport of its decisions in former cases. The constitutional provision is plain and it seems to appellees that the real gist of the decision of the supreme court of Oregon upon their constitutional provision was set forth in the case of Eaton v. Minnaugh 73 Pac. 754 where the court says:

> "Generally speaking, it may be said that a liability imposed upon a county by law, which it is not at liberty to evade or postpone, is involuntary, and not within the terms of the Constitution. But a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or *temporarily until means are provided for the payment of the expense* incident thereto, cannot be so held."

In this case the court holds that if the county cannot postpone the liability, the constitutional provision does not apply; but if the county authorities, "may in their discretion postpone indefinitely or temporarily until means are provided for the expense incidental thereto" then it cannot be held to be an involuntary indebtedness.

Under the laws of Oregon we contend that the cruising of timber for the use of the assessor could have been temporarily postponed until means were provided for the payment of the expense incidental thereto. We fail to see how the supreme court of that state in view of its former decisions could hold that the cruising of timber (an act which had never been previously performed by the county assessor and which might never be performed again) could not be postponed long enough to provide for the holding of a bond election for the payment of the cost thereof.

The lower court says that the Oregon supreme court had in the Wingate case gone far beyond the reasoning of its former holdings and without quibbling over differences in phraseology, conceded that the limits in the Oregon constitution were equivalent to those in the Idaho constitution, and said, "But,

with all due respect for the court, the reasoning by which the conclusion is reached that the cruising of timber lands constituted a duty which the defendant county could not postpone,—I have been wholly unable to appreciate. It seems to me to entirely break down the protection which the constitutional provision was intended to vouchsafe."

Appellees have referred to the two cases cited by the appellant to show that they cannot be considered as authority in the case at bar. For a recognized interpretation of the section of the constitution together with its proviso, we look for guidance to the constitutional debates and to the decisions of the supreme court of Idaho. There are appended hereto excerpts from the debates at the time of the adoption of the constitution, and from an examination thereof it will be seen that the constitutional convention had in mind that only such expenses as were necessarily incurred in carrying on the county government, such as salaries of officers or other like expenses, would be considered as ordinary and necessary, and that before any other indebtedness was created it should be authorized by an election held for that purpose. This provision of the constitution together with its proviso, received deliberate consideration from the convention, and the framers of the constitution in-

tended to safeguard the treasury and protect the interests of the public from hasty and improvident contracts such as the one with Nease. The framers of the constitution adopted a "pay as you go plan," and intended that the county should be placed upon a cash basis. The decisions of the supreme court of the state of Idaho (and I might add the district courts as well) have in every instance where there was a question of doubt as to whether an indebtedness in excess of current revenues was an ordinary and necessary expense, resolved that doubt in favor of the taxpayers of the county.

In commenting on the decision of Hickey v. Nampa 22, Idaho, 41-124 Pac. 208, the lower court said, "An expense is ordinary if it is in an ordinary class, if in the ordinary course of the transaction of municipal business or the maintenance of municipal property, it may and is likely to become necessary. It will further be assumed that if by law a specific duty is imposed and the mode of performance is prescribed so that no discretion is left with the officer, the expense necessarily incurred in discharging the duty is a necessary expense."

In section 2 of the syllabus, ex parte Bossner, 18 Idaho, 519, 110 Pac. 502, it is said:

> "Words used in a statute without any technical meaning or application should be given their ordinary significance as they are popularly understood, and the language used by the Legislature must be considered in the light of the common acceptance of the terms employed."

If the cruising of timber was considered a mandatory requirement upon the office of the assessor in the year 1914, what was the urgent necessity which required the letting of the contract and the creation of the indebtedness without submitting the question to the vote of the people as is provided by the constitution. Bond elections can be readily held and if there was an absolute necessity for the cruise, the people would have authorized the expense. The election could have been held between the first of February and the sixth of April very readily, but the evidence conclusively shows that the county officers were going to have the timber cruised regardless of the mandatory provisions of the law, the state constitution, the decisions of the supreme court, the pending injunction suit against them, the condition of the treasury, and the rights of the taxpayers of the county whose financial interest they were sworn to protect.

In Bannock County v. C. Bunting & Co., 4 Ida. 156, 37 Pac. 277, the court said:

"The item $435.09, warrant No. 58, was issued to pay for a temporary jail. It is the duty of the commissioners to provide a place for the safe keeping of prisoners. A jail cannot ordinarily be hired, as buildings suitable for jail purposes are not erected by private parties. The above amount might very properly be expended, when necessary, for repairing a jail already built; and as it was paid for a temporary jail, and is certainly a small expense for such a purpose, we think it should be held to be an ordinary and necessary expense, and authorized by the constitution.

Objection is also made to warrant No. 138 for $4000, issued for the purchase of a block of land in the town of Pocatello, as a site for court house. This is clearly not among the ordinary and necessary expenses of the county.

* * * * * * * * * * *

In the case of County of Ada v. Bullen Bridge Co., 5 Ida. 79, 47 Pac. 818, the court said:

"If it is claimed that this expenditure comes within the proviso of section 3, Art. 8, of the Constitution, we answer that a construction of that proviso as well as of the entire section, was given by this court in the case of Bannock Co. v. Bunting (Ida.) 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly $40,000, where the revenue of the county for the year was only about $70,000, would not readily be classed as an "ordinary and necessary expense." It would be difficult, we apprehend, to name an expense under such a construction that would not be "ordinary and necessary." If a necessity existed for the bridge,

there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have."

The final judgment of the court, in the case last cited, was afterward reversed on re-hearing, but on a question of procedure.

In the case at bar the total liability under the Nease contract was approximately $63,000.00, and the total current expense appropriation was very much less than that as was also the actual revenue accruing to the current expense fund for that year. The auditor's report (in evidence) shows that, at the end of the 1914 fiscal year, the county had $135,000.00 in warrants outstanding and unpaid, and only $10,000.00 in the treasury applicable to the payment thereof. THAT THE COUNTY HAD A FLOATING DEBT, in other words, of $125,000.00, half of which was caused by the letting of this Nease contract.

The county commissioners of Clearwater county, without making any provision for payment, incurred in addition to the ordinary and necessary expense for the year 1914 amounting to about fifty-nine thousand dollars, the further indebtedness of sixty

three thousand dollars for the Nease cruise. The auditor's report shows that after making the maximum levy and adding the receipts from other sources, only $53,310.06 came into the county treasury to satisfy an indebtedness of $122,352.76. It would seem that one would have but little hesitancy in reaching the conclusion that the incurring of the indebtedness for the cruising of timber was neither necessary nor ordinary. An emergency might arise which would justify the issuance of warrants to the amount of $122,352.76 against an available revenue of $53,310.06 but such an emergency did not confront Clearwater County in 1914. The statutes provide a safe and just method for the appointment of deputy assessors and the constitution provided a safe, and easy method of providing the cost of a cruise if it were necessary.

Nothwithstanding the fact that the evidence conclusively shows the Nease cruise to be incompetent and inaccurate and in addition thereto that fraudulent acts were committed by Nease and his men in the preparation of his reports and in "working in" a certain amount of state and government lands contrary to the terms of the contract, appellant contends that because the bills were allowed and warrants drawn, the county is estopped from attacking the validity of the contract.

In Dunbar v. Board of County Commissioners, 5 Idaho, 415, the court uses the following language:

"Where a board of commissioners, in violation of the constitution, incurs a large debt in excess of the revenues for the fiscal year in which they assume to incur such debt, without submitting the question of incurring such debt to the voters, and providing for payment of the interest and principal thereof, as provided by the plain provision of the constitution and statutes of the state, such board is not acting within its jurisdiction; and the action of the board in making such an order is void, and may be *attacked directly, indirectly or collaterally, at any time or place.* To hold otherwise would give the boards of commissioners power to do indirectly what the constitution forbids."

The court also said:

* * * * * * * * * * * *

"In solving this question it is necessary to determine whether the building of a bridge, and the payment of bounties for rabbit scalps, are ordinary and necessary expenses of a county. It will be seen that the two terms are used conjunctively; hence, to come within the constitutional proviso or exception, expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such year. In the case of Bannock Co. v. C. Bunting & Co., 4 Idaho, 156, 37 Pac. 277, this court, in construing section 1762 of the Revised Statutes, held that the purchase of a site

for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county." In that case this court further said: "It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of $4,000, they might purchase one at a cost of $10,000, and proceed to erect a courthouse at a cost of $20,000, all of which would be in direct violation of the constitition. It is, of course, the duty of commissioners to provide a suitable place for holding of the courts and public offices, jails, etc.; but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people." What has been said with reference to building a courthouse applies to the building of a bridge or other public improvement, within the letter and spirit of the constitution and statutes. We conclude that the building of a bridge and the payment of scalp bounties are not ordinary, but extraordinary, expenses, and, being such, cannot be created in excess of the revenue for the fiscal year in which they may be incurred without the assent of two-thirds of the electors of the county voting at an election duly called and held.

* * * * The framers of the constitution intended that the several counties of the state should be placed upon a cash basis, and that the incurring of heavy debts by the counties should not occur unless the people of the county should so authorize."

The county assessor was by law required to determine the actual cash value "as near as practicable." He certainly was not required to hire expert

timber cruisers for the timber land, horticultural experts for the agricultural land, mineralogists for the mineral land, veterinary surgeons or experts in the knowledge of value of animals for the livestock, or architects to determine the value of buildings and improvements, or experts to determine the valuation of any particular class of property or improvements. To strictly follow the mandatory provisions contended for by appellant would bankrupt any county in the state. It would lead into unknown fields wherein the revenues of the counties in any particular year would be insufficient to blaze a trail through the entangling growth of deceit, fraud and expenditure. To conceive for a moment such a municipal bankruptcy is a sufficient answer to appellant's reference to that portion of the decision of the lower court in its brief, pages 73-4.

Appellant's contention is further answered by the facts in the case which conclusively show that no two cruisers could arrive at anywhere near the same results, even though walking over the same land at the same time and under identical conditions. Why should a county incur an indebtedness of sixty-three thousand dollars for a cruise to assist its assessor in arriving at the valuation of timber lands if the cruise is inaccurate and such a sham that one of

Nease's best cruisers found and reported 500,000 feet of fir, and another equally competent cruiser, found 110,000 feet of fir on a single forty acre tract of land? If this is a necessary expense where in the realm of speculation are we going to stop?

Appellant says (pp. 58-59) "It must be conceded that the assessor himself cannot be compelled to cruise all the timber lands in Clearwater county." This is our contention exactly. If he could not be compelled to cruise all of the timber lands then it would not be deemed necessary to literally follow the requirements of the statute cited by appellant, and the conclusion in the Wyngate case, must fall.

Appellant further says, "No doubt any assessor of any county in the state of Idaho has the right to cruise all of the timber lands in his county for the purpose of enabling him to properly classify and assess them. He is doubtless privileged to do so if he has the ability and the means but he is not specifically so required." The qualifying statement, "If he has the ability and the means," is rather significant in view of the requirements of our constitution quoted. We admit that if the assessor follows the requirements of the statute in appointing his deputies (which corresponds to the "ability") and has

sufficient funds in the treasury to pay the cost thereof (corresponding to the "means"), then he can have just as much timber land cruised as in his opinion is necessary, but that is not the question now under consideration. Here the assessor made no effort to employ deputy assessors and have the compensation fixed by the board but demanded that the board enter into a contract at an exorbitant price for which the county had not the funds to make the payment. The concluding remarks of the lower court upon this point are as follows:

> "The discussion need not be further prolonged. Enough has been said to make it clear that the Legislature has not imposed upon the counties the absolute duty of cruising their timber lands, or of incurring indebtedness for that purpose. The county officers are required only to determine the full cash value of property, including timber lands, as nearly as may be practicable with the means they have. They are not obliged, nor have they the right, to overstep the constitutional limitation for the purpose merely of possibly increasing the efficiency of their service. And the county commissioners have no authority to substitute for the statutory mode of valuing property a method of their own. It follows that, the premises upon which the plaintiff rests its entire contention touching the constitutionality of the contract not being well founded, its argument falls, and the contract must be held to be void. In any other view the constitutional prohibition would in practice prove to be a mere thing of straw. If this con-

tract can be sustained, by parity of reasoning another of like character, for a second cruise, can be made at any time. Of necessity, conditions change from year to year. Some trees are growing, and others are being cut down or otherwise destroyed, and still others are deteriorating in value."

Judge Flinn in the case of White v. Board of County Commissioners, supra, held that the cruising of timber was not a necessary and ordinary expense under Section 3, Article 8, of the Constitution, and said:

"The second matter for determination is the validity of the warrants amounting to twenty-five hundred dollars issued in payment for the timber estimates of Pelham made on the timber lands of the Coeur d'Alene Indian Reservation.

"It is contended that this is an expense unauthorized by law, and that in the incurring thereof the commissioners have violated section three, article eight of the constitution.

"I am of the opinion that the purchase of such estimates even if they were purchased by the board of county commissioners was the incurring of an indebtedness or liability on the part of the county exceeding in the year 1913 the income and revenue provided for such year, and that the incurring of such expenses was not one of the ordinary and necessary expenses incurred under the general laws of the State of Idaho, and, therefore, that the same was in violation of section three of article eight of the constitution.

"Even if the incurring of said indebtedness were not in violation of said constitutional pro-

vision, I cannot see how it could be considered as an ordinary and necessary expense of the assessor's office, or how the possession of such estimates will obviate the necessity of making a personal investigation either by the assessor or his deputies during succeeding years.

"The warrants involved are therefore held to be invalid and void, and findings may be prepared in accordance with the foregoing opinion."

No appeal was taken from the decision of Judge Flinn because it was evidently clear to the defendants and their attorneys that the cruising of timber lands could not be legally considered a necessary and ordinary expense.

In view of the numerous holdings of our supreme court, the decision of District Judge Flinn just reviewed and the very able opinion of Judge Dietrich in this case we contend that the cruising of timber land is not a necessary and ordinary expense under the general laws of the state within the meaning of the section 3, Article 8 of our constitution.

This disposes of the two legal questions upon which the lower court based its decision. Before considering any of the other questions argued by appellant beginning at page 76 of its brief, or before proceeding further we request the court to read the Brief of Evidence beginning at page 10 herein.

MANDAMUS.

In the prayer of plaintiff's complaint, (Tr. 16-17), two grounds of relief are asked for: (a) That the treasurer be enjoined from paying warrants registered prior to the warrants of the plaintiff and (b) that he by mandatory injunction be required to call and pay all warrants, including the warrants of the plaintiff, in order and not otherwise.

Appellant (pp. 76-77) seeks to answer the suggestion of the District Court that notwithstanding the express direction of the laws of Idaho which require the assessor to assess at actual cash value, no person has ever by mandamus compelled any assessor to cruise timber, and further says: "Without stopping to inquire whether they could be so punished, we submit that mandamus would lie against the commissioners.* * * * *"

In the case of Harris vs. State 34 S. W. 1017 cited by appellant, the board of assessors had failed to make and certify to the board of examiners a schedule of value of railroad properties as was required by law. If the assessor, under the laws of Idaho, refuse or neglect to have prepared an assessment roll within the time provided, undoubtedly mandamus would compel him to perform his duty. That is an

entirely different condition, however, than requiring the employment of supposedly expert appraisers.

The next case cited by the appellant is State Board of Equalization vs. People, 58 LRA 513. The court held that a county board of equalization may be compelled by mandamus to perform its statutory duties of assessing the capital stock and franchises of corporations. (Syllabus 1).

In this case, however, the appellant seeks by mandatory injunction to compel the treasurer to pay warrants in violation of a positive statute.

Section 1943 of Revised Code provides:

> "The board must require their clerk, at the close of every session, to furnish them with a list of all bills and accounts of every nature approved by them at said session, giving the name of each person in whose favor an account or bill of any kind or nature has been allowed, with the amount allowed him and out of what fund the same is to be paid. They must compare their list with the record of their proceedings, and if not found correct, make it so and certify to said list and file it with the county treasurer, and the treasurer must pay no warrant drawn on any fund in the county treasury that does not correspond with the files furnished him by the board."

It is conceded that no certified list including any bills allowed to M. G. Nease was ever presented to the county treasurer.

Section 2019 of the Idaho Revised Codes provides:

> " * * * * * the removal by the county treasurer or by his consent of such moneys or a part thereof * * * * out of any legal depository of such moneys except for the payment of warrants, legally drawn, * * * * shall constitute a felony, and, on conviction thereof, shall subject the treasurer to imprisonment in the state penitentiary * * * * * ."

In the case of R. R. Puckett v. F. M. White, Commissioner of the General Land Office, 22 Tex. 560, it is said: "It is made the duty of the commissioner of the general land office, to issue patents upon such surveys only, as have been made in conformity to law. But it is proposed, by this suit, to compel the issuance of a patent upon a survey made confessedly contrary to the literal direction of a plain statute. Laws 6th Leg. 128, ch. Sec. 4. There can be no better settled principle, by the oft repeated decisions of this court, than that a mandamus will not lie to compel a public officer to perform an act which is not a duty clearly prescribed and enjoined by law. A mandamus will not lie to compel the performance of an act contrary to the provisions of a statute which is merely directory. Horton v. Pace, 9 Tex. 81; Commissioner General Land Office v. Smith, 5 Id. 471;

Cullem v. Latimer, 4 id. 329; Bracken v. Wells, 3 id. 88."

To the same effect is Cook v. Candee, 52 Ala. Rep. 110. State v. Judge, 15 Ala. 740. Rosenthal v. State Board of Canvassers, 19 L. R. A. 157. Turnbull, Relator, v J. Wright Giddings et al. Michigan 19 L. R. A. 853.

The defendant, Oren D. Crockett, as treasurer of Clearwater county, had nothing to do with the records or registration of the warrants under the Nease cruise. He is prohibited, by statute, from paying any warrants, unless a certified list of bills allowed by the board is furnished him. This list was not furnished. It is selfevident that a mandatory injunction would not issue to require the defendant Crockett to pay the warrants under such conditions.

Appellant in its brief (Page 78) in answer to the suggestion made by the lower court that if the cost of this cruise were sustained, it would be necessary to sustain the cost of another cruise this year, or in any future year, says, "It will be a simple matter for the assessing officers to make such corrections in the cruise as such change of condition shall entail, and at a very small expense." How appellant can suggest that it would be a simple matter for assessing offi-

cers to make corrections in the Nease cruise, in view of the testimony of the cruisers showing the hundreds of inaccuracies in the Nease cruise as delivered to the county, we are unable to appreciate. And then, too, the suggestion, "At a very small expense." If it was necessary in 1914 to cruise the entire county, in order to determine the correctness of claims of burned over timber lands, etc., how would the assessor in 1917, either correct the Nease cruise or determine the area of new burns, clearings, etc., unless he sent men all over the same land. We suggest that the Nease cruise in all of its inaccuracies is not subject to correction either at a very small or a very large expense.

GOVERNMENT AND STATE LAND.

This feature of the case is discussed by appellant in its brief beginning at page 79, wherein it calls attention to the contract of defendant county with Nease, which provided "for cruising of all the timbered on patented lands situated in Clearwater county, Idaho." According to the contract Mr. Nease was also to furnish a plat containing topographical sketches showing all openings, burns, marshes, lakes and other topographical features observed by the cruisers. He was to be paid for cruising timber on patented land. He was not to be paid for the acre-

age of burns, marshes, lakes and townsites. Notwithstanding the contract, however, he was able to "get by" and "work in" 144,675.49 acres of unpatented state and government land and land platted as untimbered. See brief of testimony herein.

As a basis for one of the objections made by appellant to the introduction of certain evidence by appellee, the former stated (brief page 24). "The board of county commissioners of Clearwater county was under the law charged with the power of accepting or rejecting the work done by Nease and that, having accepted the same after the performance by Nease, the county is bound by such acceptance, which closes all inquiry into the question of whether the contract had been properly performed or not, in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of acceptance."

The fact that Nease was able to "get by" with and "work in" over 144,000 acres of land for which he charged and received warrants without the knowledge of the county commissioners, seems to us to contain sufficient fraud and deceit in itself to vitiate and void the entire contract. The evidence does not

show that the county commissioners knew anything about this, but on the contrary, conclusively shows that if anyone outside of Nease and his men knew about the "working in" of unpatented lands and marshes, burns and townsites, it was the assessor. The assessor, J. F. Gorman, (the checker), Nease and his men apparently knew, but the board of commissioners did not. When a person working on a contract which will pay him five or six hundred per cent on his investment will deliberately instruct his employes and agents to defraud the other party to the contract, a court of equity certainly should not go very far to lend its extraordinary remedies to his assistance. The old maxim that, "he who comes into equity must come with clean hands" is as true now as ever.

Considerable space is devoted by the appellant to computations and allowances for deductions on a ratio and proportion basis. After trying to excuse the attempt on the part of Nease to "get by" and "work in" certain state and government lands, appellant concedes that warrants for these lands were not valid, but it does not say anything about warrants for untimbered land such as agricultural land, marshes, lakes, clearings, town sites, etc., and computations are made upon the basis of 25,283.72 acres,

whereas it should be made, if at all, on basis of 144,675.49 acres. Yet no credit is given by appellant for the number of acres of land cruised under the contract of February 24, which was mutually abandoned and admitted by all to be invalid. Appellees contend that where a contractor will, through deceit and misrepresentations claim an additional twenty-five per cent. to the amount of his work, the whole work should be condemned.

THE WARRANTS ARE NOT IN THE FORM PROVIDED BY LAW.

Three sections of the revised codes of 1887 (prior to the adoption of the constitution of the State of Idaho) provided:

> Section 1781. "Warrants drawn * * * must specify the liability for which they are drawn and when they accrued."
>
> Section 2006. "All warrants must distinctly specify the liability for which they are drawn and when it accrued."
>
> Section 2009. "All warrants issued by the auditor during each year commencing with the first Monday in January must be numbered consecutively, and the number, date and amount of each and the name of the person to whom payable and the purpose for which drawn must be stated thereon, and they must at the time they are issued, be registered by him."

After the adoption of the constitution, Section

2009 of the revised codes of 1887, was amended and appears as Section 2056 of the revised codes of 1907, which section is copied on page 91 of appellant's brief. It will be noticed that all of the requirements of section 2009 of the revised statutes of 1887 are contained in a single sentence, and were brought forward in toto in Section 2056, and commence with the words, "all warrants," in the seventh line of the section on page 91. That sentence comprising the next seven lines contains all of the requirements of Section 2009 of the revised statutes of 1887. Section 2056 of the revised codes, in addition to all of the requirements of the old law, provides that the warrants must be numbered consecutively, "and must show the year against the revenue for which they are to be issued."

Appellant contends that the "Series 1914" on the face of the warrant, which is required by the very first provision of Section 2056, is a compliance with the requirement that the warrant must state the date when the liability accrued, as provided by Section 2006, which section was carried forward in the revised codes of 1907, Section 2053. This is an entirely different section and an added requirement to the provision that the warrants shall be issued in

separate series and of the year against the revenue for which they are to be issued.

The supreme court of Idaho in the case of Feil v. City of Coeur d'Alene, 23 Idaho 50, in discussing the meaning of the word "liability" under section 3 of article 8 of the Constitution, said:

> "Bouvier in his Law Dictionary defines the word 'Liability,' as follows: 'Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice." And in support of the foregoing definition, he cites the following authorities: McElfresh v. Kirkendall, 36 Iowa 226; Wood v. Currey, 57 Cal. 209; and Joslin v. New Jersey Car Springs Co., 36 N. J. L. 145. Anderson in his Law Dictionary defines the word 'Liability' as follows: 'The state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility.' The latest edition of the Standard Dictionary defines 'liability' as 'The condition of being responsible for a possible or actual loss, penalty, evil, expense or burden.' The supreme court of California, in Pillar v. Southern Pacific R. Co., 52 Cal. 42, approved the foregoing definition from Bouvier."

Appellant in its brief, page 92, says that because Section 2056 of the revised codes of 1907, in addition to the requirements of the law of 1887, provided that the warrants must show the year against the reve-

nue for which they are issued, that fact alone nullifies the requirement of section 2053, which requires the warrants to distinctly specify the liability for which they are drawn, and when it accrued. The conclusion does not follow, and no attempt is made by the legislature to lay down in this one section all of the requirements for the form of warrant. Both of these sections were in force and effect under the code of 1887. The question was presented to this court in the case of Bingham County v. First National Bank of Ogden, 58 C. C. A. 332, 122, Federal 161, and the court held certain warrants invalid because they did not specify the liability for which they were drawn, or when it accrued, and the court said:

> "It is thus seen that the state of Idaho has by statute conferred upon the board of commissioners of the county the power to, among other things, examine, settle, and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and has expressly declared that all such warrants "must distinctly specify *the liability for which* they are drawn, *and when it accrued.*" Is any court justified in treating such language as merely directory? We think not. It is well settled that, if the statute under which a municipal corporation is organized and acts prescribes a particular mode in which the property of the corporation shall be disposed of, that mode must be pursued. Dillon on Municipal Corporation (4th Ed.) Secs. 463, 578 and 563. The state of Idaho, as has been seen, authorized

the board of commissioners of the defendant county to allow only legal claims against it, within which claims barred by its statute of limitations would not come. Carroll v. Siebenthaler, 37 Cal. 193. And it has been held that, even though the governing board of a county should allow illegal claims, it is the duty of the auditor to refuse to draw warrants therefor, and, if warrants are drawn, it *is the duty of the treasurer to refuse to pay them.* Linden v. Case, 46 Cal. 171; Merriam v. Board of Supervisors of Yuba County (Cal.) 14 Pac. 137; Trinity County v. McCammon, 25 Cal. 121.

"The present action being based solely upon the alleged warrants, and as they omit matter made essential by the statute of the state under which they purported to have been issued, they must be adjudged invalid. Being void, they were not the subject of ratification, and were unaffected by the resolution of the board of commissioners of the county embodied in the ninth finding of the court below. Dillon on Municipal Corporation (4th Ed.) Sec. 465.

The foregoing decision was approved in the case of McNutt v. Lemhi County, et. al., Idaho, February 19, 1916, 84 Pac. 1054.

And the court said:

* * * * "It is clear that there can be no ratification by a county of an act done in direct violation of the Constitution. The Constitution requires, as a condition precedent to incurring such a liability as the one sued on, that the question should be first submitted to a vote of the people of the county and receive "the assent of two-thirds of the qualified electors thereof, vot-

ing at an election held for that purpose." The purpose of the constitution is to require the specific question submitted to the electors unaccompanied and unencumbered with any other subject or question. The warrants sued on were not issued in conformity with the requirements of section 2006, Rev. St., 1887, which provides that "All warrants must distinctly specify the liability for which they are drawn, and when it accrued." This statute was held mandatory by the U. S. Circuit Court of Appeals in Bingham County v. First National Bank of Ogden 58 C. C. A. 332, 122 Fed. 16. See also Raymond v. People (Colo.) App. 30 Pac. 504."

THE ALLOWANCE OF THE BILLS.

Let us consider for a moment the statements made by appellant in its brief, page 96, together with the long list of cases cited thereunder. Appellant says:

> "If the board had authority to make the contract with Nease, it had power, and it was its duty, to determine whether the contract had been performed to its satisfaction, and its determination of that question and allowance of the claim cannot be avoided except for fraud, mistake or failure of consideration."

To appellees it seems rather academic to argue this proposition at all; for an argument of the question assumes the correctness of the major premise, towit, "the board had authority to make the contract with Nease * * * * ." The two major propositions

upon which the lower court based its decision go directly to the power of the board to enter into the contract. And while the proposition stated by appellant is in the main correct, nevertheless, a large number of cases cited do not sustain it. However they do sustain many of the points argued on behalf of appellees; and so, in reviewing some of the cases cited by appellant, we do so only to point out these rules of law laid down in them and for no other purpose.

The first case, Shirk vs. Pulaski county, Fed. cases 12794, does not sustain the proposition of appellant, but the syllabus, on the contrary sustains the contention of appellees, viz.:

> "The acts of the county authorities, in auditing the claim and issuing the warrants, is not conclusive, as a judicial determination, upon the parties."

Also the next case, Board of Commissioners vs. Sherwood, 64 Fed. 107, is a case not supporting the proposition of appellant. The court says:

> "It is quite generally agreed that county warrants are not negotiable instruments, in such sense that a transfer of the same for value cuts off equities of defense which exists as between the original parties. They are orders directing the payment of a claim which has passed the scrutiny of the auditing board. They are therefore prima facie evidence of an indebtedness, like a written admission of a debt made by

> a private individual; but they are by no means conclusive means of an indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant."

The next case viz. Thompson vs. Searcy County is authority for the proposition that a county is not entitled to a reduction of the contract price merely because the building when completed was not worth the amount charged. The case is also authority for the following proposition; Syllabus 4:

> "With respect to the interpretation of state statutes regulating the making of contracts by counties, the decisions of the state courts are binding upon the courts of the United States."

The next case cited by the appellant only approves the holding in the first case, and so on with the balance of the cases in that paragraph. It is useless to quote further, because, as previously stated, there could not be much controversy on appellant's proposition in the abstract. The difficulty with it is, however, that the facts in the present case are contrary to two of the premises, and it must be conceded that if the board did not have authority or power to enter into the contract, or, if fraud, mistake, failure of consideration or deceit entered into the securing of warrants, then and under those conditions the decision of the lower court must be affirmed.

Let us investigate the next list of cases appearing upon page 97 of appellant's brief. In the first case County of Cook vs. Ryan, 51 Ill. App. 190, the court says:

> "Can any man truthfully say that if the entire facts had been known, the certificate of W. J. McGarigle and H. S. Barnell, and the affidavit of Walker, would have been deemed sufficient? Would not, upon the presentation of the facts this record discloses, a most thorough investigation as to the delivery, weight, quality, price and necessity for and of each article have been had? Finally, is it the law that an allowance of bills by a municipal body obtained under such circumstances, is binding upon it?
>
> "Fraud vitiates all acts. The county of Cook acts entirely through agents. If they conspire against it, to deceive it, it is not bound by what they, for their profit, may by such deception for their gain, induce it to do. No allowance of any account to Francis R. Murphy was ever knowingly made. No warrant to him ever ordered."

Can any person truthfully say that if the board of county commissioners of Clearwater county had actually known the facts as disclosed by the records in this case (and really we have only touched the surface) that these warrants would have been drawn and the bills of Mr. Nease allowed? Can any one say that if a brief statement of all of the acts and proceedings of the board had been published as pro-

vided by section 1917 of the Idaho Revised Codes and referred to at page 94 in appellant's brief, in which the slightest allusion had been made to the fact that Nease was including in his bills a charge for cruising unpatented state and government lands and also including a charge for cruising marshes, burns and townsites, that either an action would not have been started at once to investigate the Nease contract, or that an appeal would not have been taken within the time provided by law under the section of the Revised Codes referred to at page 95 of appellant's brief? We certainly agree with the holdings of the case of Cook county v. Ryan, and believe that fraud and deceit vitiate all acts.

Can it be said that if the notation on the field report of Archie Young: "These two forties were actually cruised, balance done in camp," had been brought to the attention of the county commissioners that they would have allowed Mr. Nease's claim for that work?

The county acts entirely through its agents, and even though the county assessor and the county checker and Mr. Nease, all had knowledge of the inclusion of state and government land and untimbered land to the extent of 144,000 acres in the claims against the county, and these facts were not made-

known to the board of county commissioners, thereafter upon discovery of such fraudulent acts the county would be at liberty at any time to avoid the entire contract. The evidence is clear that the county commissioners never at any time knew that Mr. Nease was charging for the cruising of burns, lakes marshes, openings and towns. These commissioners acted like many other boards. They had an assessor who had years of business experience. He had before been deputy assessor, he had been probate judge, he had years of experience in banking circles and was of course familiar with bookkeeping and accounts. The county commissioners certainly were not expert accountants and in great measure relied upon the statements of the assessor that the Nease cruise was all right. All of these commissioners testified that they might look over the work a little, and upon inquiry of the assessor, and information from him that it was checking out all right, they allowed the bill.

Where can appellant find a case giving authority for the proposition that a county would be estopped from repudiating the entire contract under such circumstance. The cases cited by appellant are favorable to the contention of appellees.

Propositions D and E of appellant's brief, from pages 93 to 109, were probably given prominence because the lower court found that the commissioners did not enter into the contract from corrupt motives. The court says (Tr. 174).

> "Though the view may be entertained that the commissioners acted improvidently and were wanting in vigilance and care, I am convinced that they were not actuated by corrupt motives. The inculpatory circumstances surrounding the letting of the contract may all reasonably be referred to their inexperience in public affairs and their real, even though somewhat grotesque, fear of the so-called timber companies, and likewise their want of vigilance in requiring strict conformance and their compliance in allowing the claim as presented may very well be explained in their confidence in and reliance upon the assessor's approval. * * * * * "

Section 2258 of McQuillin on Municipal Corporations, is cited by appellant at page 98 of its brief. The same author at section 2259, however, says:

> "Any defense which can be set up in an action on any contract, can be urged in an action against a municipality on its warrants, without regard to whether plaintiff is a bona fide holder for value. * * * If warrants are construed to constitute indebtedness, and the debt limit of the municipality has been exceeded at the time of the issuance of the warrants, the municipality can not estop itself, by its conduct or otherwise, to deny its liability when sued upon such warrants."

The author cites Elly Valve Co. vs. Town of Crown Point, Ind., 3 L. R. A. New Series, 684. Syllabus 1 is as follows:

> "Warrants void because issued by a town in violation of the constitutional restriction of a debt limit are not subject to ratification."

"THE COURT WILL SEARCH THE RECORD IN VAIN TO FIND ANY EVIDENCE OF FRAUD OR ARTIFICE PRACTICED ON THE BOARD."

(Appellants brief p. 99).

Mr. Smith, in his work on the law of frauds says that it seems to be a hopeless task to frame a general definition sufficiently specific upon the one hand and comprehensive upon the other to reach the requirements of a definition. It seems that there are two necessary constituents in fraud—one, the intention to defraud; and, second, actual loss. In paragraph 126 he says:

> "A common means of perpetrating fraud is by means of some artifice or deception by which the person defrauded is prevented from exercising the ordinary caution * * * which would result in the discovery of the falsity of the representation."

We would slightly change the statement of appellant and say that if the court will search the record it will find many badges of fraud, chicanery and deceit. When the investigating commit-

tee went to Portland, they were piloted around by Mr. Nease, taken down to Astoria, Oregon, and back again by Mr. Nease, and in fact the record seems to indicate that Mr. Nease was present at all times while they were investigating him. Nothing particularly fraudulent is shown by the record here, only it shows the way many junkets are conducted--in the interests of the party to be investigated. The probate judge resigned from a position with few duties, and accepted one as assessor which would consume all of his time and at no increase in salary; the regular assessor resigned and accepted appointment as a deputy assessor. True there is nothing fraudulent about these acts, only they look strange. Immediately after the probate judge had been appointed assessor, he demanded that the county commissioners enter into a contract to cruise timber. He would give no time for investigation. He had Mr. Nease present at the meeting and would not hear from anyone else --he was the one who made the suggestion to the commissioners that anyone who had worked for a timber company would not be qualified to work for Clearwater county. Perhaps there was nothing fraudulent here but the act seems slightly hasty. The unwarranted change in the assessed value of the property of John Lewis from $3,000.00 to $10,000.00 just

after he started the suit to enjoin the cruise is a peculiar circumstance. After the service of the papers in the John Lewis suit specifically calling to the attention of the assessor and commissioners, that they were proceeding contrary to law and in violation of the state constitution, they held another meeting within two days and without call for bids, without plans or specifications, without knowing what kind of a cruise they were going to get, let a contract to cruise all of the timber land in the entire county.

The fact that M. G. Nease quickly made settlement with the timber companies and got them to withdraw the Lewis suit, (at the proper time); the constant communication between Mr. Nease and the managers and representatives of the timber companies during the time he was making the cruise: the changing of the methods of cruising from double running, (which was prevalent prior to the settlement of the Lewis suit), to single running and hastily getting over the ground with no checker on behalf of Nease to investigate the work of his men; the positive instructions of Mr. Nease to change from double running to single running; the positive instructions of Mr. Nease to cruise unpatented state and government lands, that he could "work it in;" the inclusion in the bill of

144,000 acres of unpatented land and untimbered land contrary to the terms of the contract; the mysterious keeping of the books of the checker, Gorman, for the county, so that no one had access to them except Gorman and the assessor; the fact that the assessor had ten books of reports handed to him by the county checker, Gorman, and that no demand was ever made upon Mr. Nease to ever recruise or recheck any portion of his work, notwithstanding the fact that there were hundreds of flagrant discrepancies; the ultimate and complete disappearance of these books of the county checker; the continued reporting to the county commissioners by the assessor that Mr. Nease's work was checking out all right; the fraudulent and deceitful methods employed in the office of Mr. Nease in making reports and "write-ups" entirely from the imagination of the office clerk doing the work; the "jibing" of ridges, ravines, rivers. burns, clearings, etc., by the office force; the arbitrary raising and lowering of the entire work of a cruiser without a recruise; the secret calling into convention of the representatives of all of the large timber companies for the purpose of comparing their office estimate with that of the Nease cruise before it was submitted to the county; the request that a manager of one of the timber companies call at the

Empire National Bank and assure it of the validity of the cruising warrants and explain to the president of the bank the history and dismissal of the Lewis suit; the keeping of the John Lewis suit alive and to all appearances an actual contest, and also keeping alive an appeal from the action of the board of county commissioners in entering into the contract long after the timber companies, in whose interest the suit was brought, had agreed at the Spokane conference with Mr. Nease that it would be dismissed.

All these facts form a cumulative record of fraud and deceit which is not wholly in keeping with appellant's statement quoted.

We admit that it is difficult to define fraud, but we contend that with a record so full of deceit, misrepresentation, falsifying, double-dealing and collusion, after a complete reading of the transcript one would be unable to read any passage without seeing where the particular work of Nease had something to do in the aid of the fraud and deception practiced in the securing of the warrants from Clearwater county, and we concur in the holding of the court in Cook county v. Ryan, cited by appellant, wherein it says: "Fraud vitiates all acts. If certain officials conspire against the county, it is

not bound by what they, for their profits, may by such deception induce it to do.

"SOMETIMES A STATEMENT OF FACTS ANNOUNCES THE LAW."

The Supreme Court of the State of Washington in the case of Bier v. James B. Clements, E. C. Houston and F. L. Bash, County Commissioners of Benton County, et al., filed September 18, 1917, had under consideration a case similar to the one at bar. In that case two of the commissioners "went to Pasco and consulted with E. A. Davis, an attorney of that city, who at their request accompanied the commissioners to Spokane for a conference with Messrs. Zent and Powell * * * The result of the Spokane conference was a determination to issue county bonds and out of the proceeds erect a court house. Up to this time no action had been taken by the board of county commissioners relative to the construction of a court house, nor had any discussion taken place at any of their meetings suggesting the issuance of bonds in any form for that purpose; no plans had been adopted looking to the erection of a courthouse; in fact so far as the board of commissioners was concerned the idea of erecting a court house was yet unborn.

"On Sunday, December 3rd, Mr. Zent, of counsel employed by Clements and McNeil, appeared at Prosser with the bonds issued in serial number 1 to 250 inclusive, aggregating $125,000. The bonds were dated December 4th, and contained an unsigned certificate of registration. * * * *

"At the trial witnesses on behalf of appellant representing reputable bond buyers and the State Board of Finance testified that, based upon market conditions and actual sales of like municipal securities at the time, these bonds, if advertised and offered for sale on the open market would have brought par at 4¼ or 4½ and if sold at 5½ would have brought a premium of at least eleven points. Respondents offered proof to the effect that the sale was made at a fair price, but the evidence of the witnesses so testifying is not reliable not being based upon knowledge of market conditions for like securities. * * * *

"The motive actuating commissioners Clements and McNeil to take the action they did while not very material or relevant is plainly shown. The term of office of both would have expired the following January; each had been a candidate at the preceding election and each had been defeated."

Courts are sometimes reluctant to base a decis-

ion upon the ground of fraud where county officials have acted in their official capacity. In the case at bar the lower court took occasion to comment upon the actions of the various county officials, but based its decision upon other grounds. In the Washington case just cited, the court, while perhaps having technical grounds, based its decision entirely upon the badges of fraud appearing in the record. Perhaps no one act would in itself be sufficient fraud to void the issue, yet, taken as a whole, the court had no hesitancy in declaring the proposed bond issue illegal, and said:

> "It does not seem necessary to dwell longer upon the facts before us. Sometimes a statement of the facts announces the law—this is such a case. A board of county commissioners is a legislative and deliberative body and as such, acting within its scope and discretion, its action is final. In the exercise of its discretion such a board must, however, act in good faith and without fraud in law or in fact to those whom it serves. This much the law demands and when county commissioners go beyond the limits of good faith and palpably abuse the discretion vested in them, the law will interfere for the protection of the tax payer. This record is reeking with bad faith * * * The prosecuting attorney is, by law, the legal adviser of the board. In this case he is passed over, and outside legal advice is sought. The record is silent as to the reason but in the light of other facts it may be surmised. By jugglery and secretive procedure a bond is-

sue is to be foisted upon the taxpayers of Benton County without the previous knowledge of any save the first active participants; a court house is to be built without prior determination of plans, estimates of cost, procurement of site, or deliberation or discussion of the matter on the part of the board, or indulgence in any of those matters that usually precede an undertaking of this character.

"No citation of authorities is necessary to sustain the conclusion we have reached that the action of these two commissioners was so arbitrary, fraudulent and in such bad faith as to merit the censure of the law and grant appellant the relief prayed for. Our reasoning is sustained in the following of our own cases:

Krieschal v. County Commissioners, 12 Wash. 428.

Times Pub. Co. v. Everett, 9 Wash. 518.

State ex rel Yeargin v. Maschke, 90 Wash. 249."

In the case at bar no plans or specifications were prepared, the advice of the county attorney was passed over; urgent demands of the assessor to accept the bid of Mr. Nease without investigating the bids of other parties; the failure to check the Nease cruise and many of the other facts ~~inaugurated~~ detained herein are as strong if not stronger badges of fraud than appeared in the Washington case.

At page 99, appellant relies on a new argument, and indicates that even though fraud and artifice

were practiced upon the board and thereby it was induced to allow bills which it otherwise would not have allowed, and even though the court should hold that the acceptance of the work by the board did not preclude inquiry into the character of the work, that nevertheless the terms of the contract prevent the county from investigating the deceitful and fraudulent practices of M. G. Nease and his agents in the acquiring of the warrants. And appellant says that the county had a ten thousand dollar bond. What chance has it to recover forty-five thousand dollars under a ten thousand dollar bond? If fraud and deceit were practiced in the securing of the warrants; or, if the contract was made in contravention of a direct statute; or, in contravention of the provisions of the constitution, then must we go to a void contract for relief? Certainly not.

At page 101 of appellant's brief, suggestion is made that if fraud has entered into a large part of the contract and a large part of the work is defective, then certainly there must be some little portion of the work performed by Nease that is correct. Just where this correct portion is has never been pointed out. In every instance wherever a comparison was made with the report turned into the county, either by the Wherry and Swanson recruise or by Nease's men them-

selves, or by a comparison with the Nease reports and the estimate of the timber companies, it was conclusively shown that the work was inaccurate and unreliable.

On the same page and in the second paragraph, appellant makes the statement as a basis for argument, "if the county commissioners had authority to make the contract." Practically all of appellant's brief from page 79, is predicated upon the assumed premise that the board had authority to make the contract. The lack of such authority is one of our defenses and it was ably sustained by the lower court.

Appellant says, page 102, "cruising is not an exact science in any event." This we readily admit and the record amply proves that the cruising performed by Nease was nothing more or less than a wild guess and even the guesses as turned into Nease are jibed, doctored, falsified and distorted before being given to the county. Appellant admits that the method applied by Nease was not so accurate as others, but states that the expense of the other method is generally prohibitive. If according to appellant's original argument that a cruise was indispensable to the assessor, in making the assessment, then he undoubtedly would be required to have an accurate and

not a counterfeit cruise made. Could anyone say that the assessor had complied with the interpretation of the requirements of the law as stated by the appellant by having made the most inaccurate and unreliable form of cruise which has ever been recognized for any purpose? If an accurate cruise—(and the record would indicate that there is no such thing)—is prohibitive on account of the expense, then where does appellant find logic, argument or reason for its contention that any kind of a cruise will do, or if a good cruise is too expensive that an unreliable, inaccurate and erroneous cruise as a basis for faulty, deceitful and "jibed" reports is required by the law, in order that the assessor may not languish in jail for a dereliction of duty?

Attention is called by appellant at page 103 to the animus of Roy Wherry, who checked some of the Nease work. The evidence conclusively shows that Wherry did not know the location of the land he was going to check until he had left Orofino; that he had no reports of Nease in his possession; that he did not know whether he was going to meet a high or low cruise. He was in court, and subjected himself to a rigid examination. The entire array of cruisers whose names appear at pages 105 and 106 of appellant's brief were present in court and facing him, yet

the record is silent and does not show where any one of these men ever made a single attempt to dispute or discredit his testimony. If Roy Wherry found green timber and a fine body of second growth white pine where Nease's cruisers had advised the county that it was burned, and so platted it on their reports returned to the county, and this testimony remained undisputed, we would conclude perhaps that Wherry's testimony was correct; regardless of any animus or bias.

Appellant says at page 103 that the defendant county made no attempt to check the correctness of Nease's cruise except by Wherry and Swanson and that they only cruised 6,448 acres. As admitted by appellant on the preceding page, the cost of making a careful cruise would be absolutely prohibitive. However, the small number of acres recruised by Wherry and Swanson in comparison to the 500,000 acres cruised by Nease is small; nevertheless the inaccuracies of the report and the fraudulent work done in the field and the deception practiced by Nease and his cruisers as disclosed in this comparatively small recruise, should conclusively show to any fair-minded person that the entire cruise was made up of hasty, inaccurate and fraudulent work. As Colonel Harvey says in the current North American Review:

> "We need not further analyze the noisome contents of the cup. These few drops are sufficient to indicate the vileness of the whole."

At page 110 appellant alludes to the John Lewis suit and it is stated that there is no evidence to show that Nease had anything to do with instituting or delaying the disposition of either of the actions. We would hardly expect either Mr. Nease or any other interested party to make such an admission. The fact remains, however, that Nease and the timber companies agreed that the suit should be dismissed early in the summer. Why was it not dismissed? Mr. Harlan stated and testified to the fact that if this suit had not been kept on the docket that he or other taxpayers would have instituted a similar suit. Appellant admits at the bottom of page 110 that Lewis was nothing more or less than a pawn for the Clearwater Timber Company. Yet this same Clearwater Timber Company, by the way, was in conference with Mr. Nease during the summer and had their estimates at Portland and checked over the Nease cruise before it was returned to the county. While the evidence may not be direct that these suits were kept pending to blind the vision of the taxpayer as to the status of the conditions and arrangement between Nease and the timber companies, the fact remains that they had such an effect, and answers

the suggestion made by the lower court that an appeal from the action of the board of county commissioners could have been taken. It is well known that if one taxpayer starts a suit in the interest of all taxpayers, no other individual is going to hastily run in and start a similar suit.

Under subdivision B of appellant's brief at page 113 is cited McQuillin on Municipal Corporations, section 2251. This section provides:

> "A person taking a warrant is bound to know the law relating thereto. He is not a favored creditor * * *. However, if the warrant of a municipality is invalid but the original indebtedness is valid, the holder of the warrants may recover on the original indebtedness. But if one purchases void warrants, he cannot recover the amount paid from the city unless it is shown the latter properly received the money and used it for legitimate purposes."

The following language in Abbott on Municipal Corporations 528, viz:

> "Provisions that a warrant shall show upon its face the purpose for which it was drawn are usually considered mandatory, and in the absence of such recital no recovery can be had even by a bona fide purchaser."

was quoted with approval in the case of Borough of Secaucus vs. Kiesewetter, N. J., 84 Atl. 622.

Appellant at page 114 says:

> "The county having received and retained the fruits of the contract, cannot shield itself by a plea of irregularity."

It would seem from an examination of the evidence that the "fruit," by the time it had reached Clearwater county had been transported by so many unclean hands that it had entirely decayed from skin to core, with deceit, misrepresentation, chicanery and fraud.

Argument along the same line is carried on at page 115, but predicated upon the assumption that "if the county commissioners had authority to make the contract;" and under this heading suggestion is made that before the completed cruise was available it brought about three million dollars of increased value on the tax rolls. If the cruise was not available, how did it bring about this result? Perhaps by the same method that the John Lewis land was increased in valuation for assessment purposes from three thousand dollars to ten thousand dollars. If an assessor could arbitrarily do this in three minutes without a cruise, on a very small tract of land, what could he do in the entire county?

Statement is made that the county used the cruise before the state board of equalization with its approval. It appears that one of these books was

taken to the board for exhibition purposes, but it developed at that meeting that while Clearwater county was assessing its timber land on the basis of a cruise most of the other land in the state was being assessed by a different method.

Section 5, Article 7 of the State Constitution provides.

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal:"

It was not intended that one county should cruise its timber while another county should use a blanket assessment. It was not intended that two or three county commissioners or assessors should prescribe a method of assessment of timber land different from the method adopted by the balance of the counties in the state.

Appellant at page 119 under subdivision B argues that mandamus will lie to compel the county treasurer to pay the warrants even though they are not in proper form and no certified list of the claims allowed had been filed with him, as required by statute. It is conceded that the list was not filed, and

that section 1943 of the Revised Codes requires that such lists be filed, and that the treasurer must pay no warrants unless it is so filed with him. This same statutory inhibition was referred to by this court in the case of Bingham County vs. First National Bank of Ogden, Utah, supra. In addition to the cases heretofore cited that mandamus will not lie to compel a county officer to perform an act prohibited by a positive statute, we call the court's attention to two sections of Article 7 of the State Constitution, as follows:

> "Sec. 13. No money shall be drawn from the treasury but in pursuance of appropriations made by law.
>
> "Sec. 14. No money shall be drawn from the county treasury, except upon the warrants of a duly authorized officer in such manner and form as shall be prescribed by the legislature."

The only reason advanced by appellant why mandamus should lie in this instance, even though prohibited by law and by the state constitution, is found at page 120, wherein it says "it appears that claims of other parties were allowed and warrants issued therefor, for which no certified list was given to the county treasurer, * * * ." Just because the county treasurer in some instances had violated the provisions of the statute it cannot be used as author-

ity for mandamus against him in a case reeking with bad faith, fraud and deceit. If no other defense were made by the county treasurer, it would seem that this one would be sufficient reason for a dismissal of the action as to him.

Certainly the mandates of the constitution and the laws of the state are not to be lightly set aside and avoided, and the taxpayers of the county must rely upon the courts to safeguard their interests from contracts made in violation of the laws enacted for their protection.

For the reasons herein set forth, we contend that the decision of the lower court should be affirmed.

Respectfully submitted,

FRED E. BUTLER,

JOHN R. BECKER.

Received copy of the foregoing brief September 29th, 1917.

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Attorneys for Appellant.

APPENDIX.

At the time of the adoption of the constitution of the State of Idaho the convention had in mind only such expenses as were necessarily incurred in carrying on the county government, such as salaries of officials and other like expenses, and the following appears at page 584 et seq., Vol. 1 Idaho Constitutional Convention:

SECTION 3.

SECRETARY reads Section 3, and it is moved and seconded that the same be adopted.

Mr. HARRIS. I move that it be stricken out.

Mr. HAMPTON. I offer an amendment to strike the whole section out, as the county would be prevented from paying the regular current expenses in some cases, if it happened that the amount which was levied did not amount to as much as was necessary to run the county government. For instance we might have heavy county expenses that would run up considerably beyond the amount that was allowed by the board who made the levy, and in that case there would be no means of paying the debt—it would be null and void—all the expenses that were necessarily incurred in the carrying on of the county government would be null and void. It seems to me that is entirely wrong. * * * * * * * * * *

* * * Mr. CLAGGETT. Mr. Chairman, I offer the following amendment to Section 3.

SECRETARY reads: Add at the end of Section 3: Provided, That this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state.

Mr. CLAGGETT. I move the adoption of the amendment. (Motion seconded).

Mr. AILSHIE. I would like to hear that read.

SECRETARY reads: Add at the end of Section 3 as follows: "Provided this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state."

Mr. CLAGGETT. I simply call the attention of the convention to the fact that the way it reads now it would prohibit the issuance of county scrip to pay the ordinary indebtedness absolutely imposed upon the county as provided by law, in case there should be any heavy expenses, as suggested by Mr. Hampton, exceeding the current revenues of that year; and that is intended to apply to special indebtedness, I should judge.

Mr. AILSHIE. That nullifies the section as it stands now. What absolutely nullifies the section, destroys the whole life of it. If they can go on and issue scrip, that is incurring indebtedness. * * * * *

* * * * * Mr. CLAGGETT. I would like to ask the gentleman from Ada one question. I offered this proviso to call the attention of the convention to this matter. We don't want to go over this too fast. For instance, the general laws of the state will provide that the witness fees are so much, the mileage fees are so much, all the expenses of the county government are fixed by law. Those expenses are paid annually by the issuance of county scrip, or paid as they arise by the issuance of county scrip. We all know that in the practical administration of county government, that there sometimes will be extraordinary expenses. I mean extraordinary expenses in

the ordinary administration of affairs. I am not speaking now of special indebtedness at all, but the ordinary general indebtedness which is incurred in the way of administration of county affairs. Now, of you pass that section in the way it is you will absolutely require that when a witness wants to get his fees, after he has attended upon the court, before he can do it the county commissioners have got to stop and submit at a special election to the whole vote of the people as to whether they will pay them or not, and that is the object of the proviso; it is to limit the section to such indebtedness as does not arise under the ordinary administration of the county. I will call for the reading of the amendment again, Mr. Chairman, so that we may understand it.

SECRETARY reads: Add at the end of Section 3 as follows: "Provided that this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state."

Mr. REID. Will the gentleman accept this amendment: "Provided it shall not apply to the usual and necessary expenses."

Mr. CLAGGETT. Certainly, I will accept the amendment.

Mr. BATTEN. I am opposed to the amendment or substitute offered by the gentleman from Shoshone. If we are going to restrict any state or municipal indebtedness, let's restrict it. Let's not do as did Rip Van Winkle when he made a resolution not to drink anything—keep on drinking and say each drink did not count. Now we are here in this article dealing with municipal and state indebtedness, dealing with it with a view to restrict it within certain bounds. Now the object of this proviso would eat the

whole life out of the matter, deprive it of its very meaning, so that I am for that reason opposed to it. There are ample provisions made for meeting every objection which is urged against it, and that is if two-thirds of the qualified electors shall deem the emergency such as to require an additional levy, they can order an election or vote for that purpose. Now why restrict that indebtedness and then in the next line say we don't mean it? That is the effect of the whole matter. It seems that there is unanimity of sentiment in both committees, the committee on Municipal Corporations have a section identical with this, and in preparing this draft I took the section from that of California in the main, and I also found the same sections is in almost all the states, and I think we should go a little slow about stripping from this provision the very meaning we have put in it.

Mr. REID. I think the objection raised by the gentleman from Alturas does not apply, because if you continue down in the fifth line you will see it reads. "Unless, before or at the time of incurring such indebtedness provision shall be made for the colsection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund." It seems that the section was intended to apply to the incurring of a permanent indebtedness, and it seems as though the committee did not mean to limit it to current expenses, because if so, the committee would not have put in the balance of those lines, in the fifth, sixth and seventh lines. Now as to the incurring of any permanent indebtedness or extraordinary indebtedness out of the usual course, I am in favor of limiting that in the way in which we usually limit counties. A man does not know as suggested by the gentleman from Shoshone, when he gets county scrip for attending as a juror or a witness—he does not know whether it is in the county treasury or not. The effect of it would

be to hold county scrip down to allow speculators to get hold of it.

* * * * Mr. HAMPTON. I desire to offer a substitute for the gentleman of Shoshone's amendment, Insert after the word "purpose" in the third line, the words "except for necessary court expenses." This is a thing that must be provided for, it seems to me.

Mr. CLAGGETT. "Ordinary and necessary" placed at the close, brings out the meaning of expenses, the effect.

Mr. PRITCHARD. It seems to me that it will not. (Reading): "Any indebtedness or liability incurred contrary to this provision shall be void," it seems to me to provide that if any indebtedness above what is provided for should occur, court expenses or anything of that kind, it is simply void by this provision, and an election or anything else would not make it legal. It is simply void unless an election is going to make it legal.

SECRETARY reads: Insert in the third line the words "except for necessary court expenses."

Mr. MORGAN. I think the gentleman from Cassia's substitute is entirely covered by the amendment of the gentleman from Shoshone; it would include the ordinary court expenses. I think the entire matter is covered by the gentleman from Shoshone and I hope it will prevail. (Cries of question).

Mr. PEFLEY. It occurs to me if that motion should prevail it would cut cities off. Now we are liable to fall short in our ordinary levy in this city. We have streams running adjacent through the city that in time of high water, and ditches all the time,

that are liable as I said to break away and run down through the city, and if we had to wait to hold an election and get two-thirds of the voters to ratify another levy, the whole city might be ruined before it could be abated, and I would not like to see anything of that kind occur. I think it should apply to cities and counties alike and all corporations, that they should be allowed in contingencies to abate them immediately without waiting for an election to be ratified by two-thirds.

Mr. HOWE. I wish to offer an amendment to the section.

SECRETARY reads: To amend Section 3, line 3, by striking out the words "income and revenue provided for it" and insert "usual and necessary expenses."

Mr. HOWE. I think it should properly be taken and substituted for the amendment of the gentlemen from Shoshone. I don't understand, Mr. Chairman, that phrase "income and revenue." Now before the commissioners fix the amount of the levy that they will put upon the property for such amount of indebtedness, they will first ascertain what the liabilities are and what the requirements are, and they will make such levy as to cover the whole—that is of the indebtedness at that time; and they may make a levy to cover the indebtedness, not to cover income and revenue. They raised this income and revenue to meet the expenses, and all we have to guard against the income.

* * * * SECRETARY reads: "Add at the end of Section 3 as follows: 'Provided that this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state.'"

Mr. CLAGGETT. And I except the amount of any general or ordinary expenses.

The CHAIR. The gentleman from Shoshone offered an amendment to which Mr. Howe offered a substitute. The question is now upon the substitute offered by the gentleman from Nez Perce.

Mr. GRAY. Let's see what that is.

SECRETARY reads: In Section 3, line 3, strike out the words "income and revenue provided for it" and insert "usual and necessary expenses." (Vote).

The CHAIR. It is lost. The question now recurs upon the amendment of the gentleman from Shoshone, Mr. Claggett; are you ready for the question? (Cries of "Question").

Mr. MORGAN. I move the adoption of the section as amended. (Seconded).

Mr. HARRIS. I move an amendment to the section.

SECRETARY reads: Amend Section 3 by striking out the words "two-thirds" in line 4, and insert the words "a majority."

Mr. HEYBURN. I second the amendment.

The CHAIR. The question is now upon the amendment offered by Mr. Harris. (Rising vote shows 15 ayes, 26 nays). The amendment is lost. The question now recurs upon the motion of the gentleman from Bingham that the section be adopted. (Carried).

INDEX OF EXHIBITS ANNEXED TO ANSWER OF APPELLEES.